FILE COPY.

Supreme Court of the United States

Office Supreme Court
FILED
NOV 14
JAMES H. McKenney

~~October Term, 1906, No. [illegible]~~

October Term 1906, No. 156

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error,
ROCHESTER, NEW YORK.

WILLIAM C. TRULL,
JOSEPH S. CLARK, *of Counsel.*

Supreme Court of the United States.

October Term 1905, No. 501.

October Term 1906, No. 156.

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

The above case involves the constitutionality of an Act of the Legislature of the State of New York, entitled "An Act in relation to Railroads, constituting Chapter 39 of the General Laws," passed in 1890 and being chapter 565 of the laws of that year. In so far as the provisions of Sections 90 and 98 of that Act have been held by the highest court of the State of New York to apply to such streets in the City of Rochester, State of New York, in which the plaintiff in error, or its predecessor, the Rochester City & Brighton Railroad Company, obtained its franchise and constructed its railroad prior to the seventh day of May, 1884.

The provisions of Section 90, as amended by Chapter 933 of the Laws of 1895, are as follows:

> "*Sec. 90. Street Surface Railroads. General Provisions.* The provisions of this article shall apply to every corporation which under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, or village, or in any two or more civil divisions of the state, and every such corporation must comply with the provisions of this article. * * *"

The provisions of Section 98, material here, are as follows:

> "*Sec. 98. Repair of Streets. Rate of Speed. Removal of Ice and Snow.* Every street surface railroad corporation, so long as it shall continue to use any of its tracks, in any street, avenue or public place, in any city or village, shall have and keep in permanent repair, that portion of such street, avenue or public place, between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any such corporation to make pavements or repairs, after the expiration of thirty days notice to do so, the local authorities may make the same at the expense of such corporation * * *"

The plaintiff in error contends that this statute is in contravention of the Constitution of the United States, in so far as it has been held to apply, as aforesaid, in that it impairs the obligation of the contract under which the Rochester City & Brighton Railroad Company, its predecessor, acquired and owned its franchises, and the Act, as construed by the highest court of the State of New York, operates to deny to the plaintiff in error, due process of law and the equal protection of the laws.

STATEMENT OF CASE.

The City of Rochester, a municipal corporation, created under the

Laws of the State of New York, brought this action against the plaintiff in error, a street railway corporation incorporated under the Laws of the State of New York, to recover, pursuant to the provisions of Section 98 of the Railroad Law, for paving between the tracks and two feet outside the tracks of said Railroad company, in St. Paul Street and Park Avenue, two of the public streets of the City of Rochester, in which the predecessor of the plaintiff in error, the Rochester City & Brighton Railroad Company, had acquired its franchise and constructed its road, prior to the seventh day of May, 1884.

(See Record, pages 3 to 7 inclusive).

The plaintiff in error interposed an Answer relying upon a Special Act of the Legislature passed February 12th, 1869, being Chapter 34 of the Laws of the State of New York for the year 1869, and also upon its franchise granted by the Common Council of the City of Rochester in the year 1862, and amended on the 12th day of January, 1869, and claimed that as to these particular streets, it was exempted by such consent of the Common Council and such Special Act of the Legislature, from making any pavements between its tracks or the rails of its tracks, or any distance outside, and specially alleged that the Sections of the Railroad Law hereinbefore quoted, if held applicable to the plaintiff in error, so far as the streets set forth in the complaint were concerned, such legislation was violative of the provisions of Subdivision I of Section 10 of Article I and of Section 1 of Article 14 of the Constitution of the United States.

(See Record, pages 7 to 17 inclusive).

The action was tried at a trial term of the Supreme Court of the State of New York, held in Monroe County in December, 1903, and all of the facts were stipulated in open court, by counsel, except one fact, which was proved by the plaintiff in error without contradiction, and found by the trial court.

(See Record containing the evidence, and Findings of Fact, pages 25 to 71 inclusive).

The trial court found, as conclusion of law, that defendant in error was entitled to judgment dismissing the complaint upon the merits, and judgment of dismissal was accordingly entered.

(See Record page 75).

An elaborate opinion was written by the trial court, which is found in the record, pages 77 to 94 inclusive.

Upon appeal by the defendant in error, to the Appellate Division of the Supreme Court in the Fourth Judicial Department, State of New York, the judgment was unanimously affirmed, without opinion.

(See Record page 95).

Upon appeal by the defendant in error to the Court of Appeals of the State of New York, the judgment was reversed and all the facts being stipulated, the Court of Appeals, pursuant to the provisions of Section 1337 of the Code of Civil Procedure of the State of New York, the material part of which is as follows: "In any action, on appeal to the Court of Appeals, the Court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to," directed the Supreme Court to render a judgment for the defendant in error against the plaintiff in error for the amount demanded in the complaint,—principal, interest and costs. Such judgment was accordingly entered for twenty-three thousand seven hundred four dollars and fifty-five cents ($23,704.55) on the 6th day of November, 1905.

(See Record, pages 1, 2, 110, 111).

The judgment of reversal was by a divided court, the court standing four to three. The prevailing opinion was written by Chief Judge Cullen.

(See Record, pages 97 to 101 inclusive).

The opinion of the minority of the court was written by Judge Gray.

(See Record pages 101 to 109 inclusive).

The opinions are certified by the Clerk of the Court of Appeals (See Record page 96), by the State Reporter (see Record page 109) and the Clerk of the County of Monroe. (See Record page 118).

The plaintiff is a municipal corporation, duly incorporated as a city under and by virtue of chapter 199 of the Laws of New York for the year 1834, which act, together with a number of amendatory acts, was consolidated by chapter 143 of the Laws of 1861, and the various amendatory acts thereafter passed, together with that act, were consolidated by chapter 14 of the Laws of 1880, and the charter was further amended by chapter 182 of the Laws of 1898, known as the Charter for Cities of the Second Class, and the various acts amendatory of that act. (Record page 30).

The defendant is a domestic corporation, duly incorporated under the provisions of chapter 252 of the Laws of 1884. Its articles of association were filed in the office of the Secretary of State on the 25th day of February, 1890, and the route designated in its articles of association comprised with other streets, all of the routes designated in the articles of association of the Rochester City & Brighton Railroad Company hereinafter referred to. (Record pp. 42, 43).

On or about May 31, 1862, the Rochester City and Brighton Railroad Company, a domestic street surface railroad company, was duly incorporated under and pursuant to the provisions of the General Railroad Act of the State of New York, known and designated as chapter 140 of the Laws of 1850. The route described in the articles of association of the Rochester City and Brighton Railroad Company is identical with certain of the routes described in the articles of association of the defendant. (Record pp. 30, 43).

On or about the 24th day of June, 1862, the Common Council of the City of Rochester, in the exercise of the authority conferred upon it by the General Railroad Law of 1850, consented to the construction by the Rochester City and Brighton Railroad Company of a street surface railroad upon the routes designated in its articles of association, and one of the conditions of the grant was, that the grantee should improve with suitable material as required by the Common Council of the city of Rochester and in a proper manner between its tracks, the rails of its tracks, and for two feet four inches outside thereof, and should keep the surface of the street inside the rails, and for two feet four inches outside thereof in good repair.

Section 6 of the Ordinance of 1862, provided as follows:

> "Section 6. The said railroad company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge, such children to ride free."

On July 6, 1862, the railroad company, by resolution of its directors, accepted the ordinance, and this acceptance was approved by the city. (Record pp. 31, 32, 33).

On or about the 16th day of October, 1862, the Rochester City and

Brighton Railroad Company mortgaged its rights, privileges, property and franchises to Hobart F. Atkinson, as trustee. This mortgage was duly foreclosed and at the foreclosure sale the rights, privileges, property and franchises of the Rochester City and Brighton Railroad were purchased by one Chauncey B. Woodworth. (Record pp. 32, 34).

On or about March 5, 1868, pursuant to the statutes of the State of New York, Mr. Woodworth duly associated with himself as such purchaser, certain persons and duly incorporated a company by the name of the Rochester City and Brighton Railroad Company, for the purpose of operating the railroad theretofore operated by its predecessor corporation, the Rochester City and Brighton Railroad Company.

By the terms of these last articles of association, the company was to continue for ninety-nine years. (Record p. 34).

Immediately after the incorporation of the new corporation, known as the Rochester City and Brighton Railroad Company by the purchaser and his associates, the new company petitioned the Common Council, protesting against the onerous conditions of the resolutions of 1862 above quoted, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid, owing to the existence of such conditions. Thereupon the Common Council of the city of Rochester on the 12th day of January, 1869, duly amended the last clause of section 2 of the Resolution of 1862, and also section 6 of said resolution.

Section 2 being amended to read as follows:

> "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same, and the rails should be laid even with the surface of the streets and shall conform to the grades thereof as now established or as they shall from time to time be established or altered. Such company shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of such streets inside the rails and for one foot outside thereof, in good and thorough repair under the direction of the Committee on Streets and Bridges of the Common Council and shall thereafter keep such streets in good repair inside its tracks or between the rails of their track, only during the term of

five years and whenever it appears necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of the making of the same, during the term of five years from the adoption of this amendment."

(See Record, page 34-35).

Section 6 of the Ordinance of 1862 was, by the amended ordinance of 1869, amended so as to read as follows: "Said company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road, or from the extremity of either railway depot, a sum not exceeding five cents, except children under five years of age accompanied by parents or other persons having them in charge, such children to ride free, and except also that said company shall not charge or receive from children under twelve years of age more than three cents for any of the above distances." (Record page 35).

Shortly after the adoption of the resolutions referred to as adopted January 12th, 1869, a proposed Act was drawn by the R. C. & B. R. R. Co., a copy of which was transmitted to the Common Council of the City of Rochester, by the Mayor of said City, with a written request that said Common Council, by resolution, approve and direct the clerk to transmit the bill to the members of the Senate and Assembly, with the request that they procure its passage. That thereafter the Common Council of the City of Rochester duly passed the following resolution: "Resolved that the Clerk of this Board be authorized to transmit a copy of the bill relating to street railroads, presented by the Mayor to this Board, to the legislature, requesting that Body to legalize the action of the Common Council by the passage of said bill."

(See Record, page 35).

And on or about the 12th day of February, 1869, said Act was passed by the Legislature of the State of New York and duly signed by the Governor of said State and is entitled "An Act for the Relief of Rochester City & Brighton Railroad Company," and is known and designated as Chapter 34 of the Laws of the State of New York for the year 1869.

(See Record, page 35) And Act in full, Record, pages 17 and 18.

The first section of the Act permitted the R. C. & B. R. R. Co. to maintain and operate a railroad in all of the streets of the City of Rochester in which it had a track then laid, and with the permission of the Common Council in such other streets as it should elect to use for that purpose.

Section two of the Act gave it the right to abandon its track in certain streets.

Section three provided for the right of condemnation.

Section five of said Act was as follows:—

> "Sec. 5. Said company shall put, keep, and maintain, the surface of the streets inside of the rails of its track, in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but shall make its rails in such street or streets conform to the grade thereof."

Said Act of 1869, enacted section 6 of the Ordinance of 1862, as amended in 1869, as follows: "Section 4. Said company may and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road, towards or from the intersection of Buffalo street and State and Exchange streets in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five years of age accompanied by parents or other persons having them in charge, shall ride free." (Record, pp. 17, 18.)

In the year 1890, the Rochester City & Brighton Railroad Company duly petitioned for and acquired from the Common Council and property owners the right to change its motive power from horse to the overhead system of electricity. (Record, pp. 41, 42.)

On or about the 25th day of February, 1890, the defendant duly leased the railroads, property, rights privileges, and franchises of the Rochester City and Brighton Railroad Company for the unexpired term of its charter and entered into the possession of the demised railroads and property. Subsequent to said lease and in the year 1890, the defendant as such lessee, duly acquired the entire capital

stock of the Rochester City and Brighton Railroad Company and accepted and received due surrender and transfer thereof and thereupon, pursuant to the provisions of the statutes of the State of New York, the estate, property, rights, privileges and franchises of the Rochester City and Brighton Railroad Company were vested in the defendant and ever since have been and now are held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by said Rochester City and Brighton Railroad Company. (Record, p. 44.)

In or about the year 1890 the defendant obtained consent from the Board of Railroad Commissioners of the State of New York to change the motive power of the railroad so acquired by it, from horse power to electricity. It made such change, and in the course thereof reconstructed its railroad in its entirety at an expense of upwards of $4,000,000. The defendant, in making the lease and in acquiring the capital stock of the Rochester City and Brighton Railroad Company, and in the expenditure of the sum of $4,000,000 in the conversion of the railroad from a horse to an electric railroad, did so in reliance upon its exemption from paying any portion of the cost of the permanent improvement of the streets, created by its contract with the city of Rochester, confirmed by the provisions of the Act of 1869, above quoted, and the contract, Exhibit B, annexed to the answer. (Record, p. 45.)

Since the agreement and consent of the city of Rochester to the passage of the Act of 1869, and since the passage of that act, neither the Rochester City and Brighton Railroad Company nor the defendant has ever been assessed for or required to pay any portion of the expense of the permanent improvement of any portion of any street, avenue or highway included within the route of its said railroad within the city of Rochester, until after the decision of the Court of Appeals in

Conway vs. City of Rochester, 157 N. Y. 33, decided Oct. 18th, 1898.

That action was brought by a taxpayer against the City of Rochester and others, composing the Executive Board of that City, to enjoin the city from levying a tax upon the plaintiff, an abutting

property owner, for any part of the pavement constructed in Lyell Avenue in said City, in which street the Rochester City & Brighton road prior to May 7th, 1884, had obtained its franchises and constructed its railroad upon the ground that the city had not notified the Rochester Railway Company to pave between its tracks, the rails of its tracks and two feet outside as required by Section 98 of the Railroad Law. A temporary injunction was granted and dissolved by the special term of the Supreme Court and its order affirmed by the Appellate Division of the Supreme Court, the Appellate Division certifying to the Court of Appeals two questions, which were as follows:—"First, are the abutting owners on Lyell Avenue liable for the cost of constructing a new pavement between the tracks, the rails of the tracks, and two feet in width outside of the tracks of the Rochester Railway Company?" "Second, Is the duty of the Common Council of the City of Rochester to request the Rochester Railway Company to construct a pavement, between its tracks and the rails of its tracks, and for two feet outside thereof, on Lyell Avenue, before the city constructs such pavement, mandatory?"

The Court of Appeals reversed the order dissolving the injunction and answered the first question in the negative and the second in the affirmative.

The plaintiff in error was not a party to that action, although the city urged that the provisions of the Railroad Act were not applicable to that particular street, and that the provisions of Chapter 252 of the Laws of the State of New York for the year 1884 and the provisions of Chapter 565 of the Laws of 1890 were not applicable, inasmuch as the saving clauses in each of those acts saved the rights of the Railroad Company and it was not liable to pay for any part of the pavement in that particular street.

From the time of the passage of the Act of 1869, and up to the time of the passage of chapter 252 of the Laws of 1884, the Rochester City and Brighton Railroad Company kept in repair the pavement between its tracks and the rails of its tracks, as required by the ordinances and by the statute, and after the passage of chapter 252 of the Laws of 1884, it kept in repair the pavements of the streets into which it had extended its tracks under the provisions of that act, between its tracks, the rails of its tracks and for two feet outside, up to the

time of its lease of its road to the defendant, and the defendant thereafter and up to the time of the decision of the *Conway Case* by the Court of Appeals, kept in repair the pavements between its tracks and the rails of the tracks in all streets in which the Rochester City and Brighton had constructed a railroad prior to the passage of chapter 252 of the Laws of 1884, and in those streets in which either the Rochester City and Brighton or the defendant had extended its tracks after the passage of the act of 1884, it kept the pavement in repair between its tracks, the rails of its tracks and for two feet outside, and both of said companies complied with all the provisions of the act of 1869. (Record pp. 35, 36, 45, 46).

In the year 1884, the Legislature of the State of New York passed Chapter 252 of the Laws of 1884, entitled, "An Act to provide for the construction, extension, maintenance and operation of street surface railroads, and branches thereof in cities, towns and villages." This Act was known as the General Street Railroad Act. It provided for the incorporation of street railroads, and the extension of the tracks of existing railroads. Section 9 of that Act provided as follows:

> "Sec. 9. Every such corporation, incorporated under, or constructing, extending, or operating a railroad constructed or extended, under the provisions of this Act, within the incorporated cities and villages of this State, shall also, whenever and as required, and under the provision of the proper local authorities, have and keep in permanent repair, the portion of every street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside, and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks, so constructed, under the provisions of this Act. In case of the neglect of such corporations to make such pavement or repairs, the local authorities may make the same at the expense of such corporation, after the expiration of thirty days notice to do so."

Thereafter the Rochester City & Brighton Railroad Company extended its road in streets in which it was constructed, and in other streets.

On the 29th day of March, 1887, the Common Council of the City of Rochester passed an ordinance in relation to street railroads. Section 2 of the ordinance was as follows:

"Sec. 2. The track of such railroad shall be so laid as to permit the free passage of vehicles and carriages over the same * * * As soon after the adoption of this ordinance as the condition of the streets and avenues through or along which any street sunrface railroad track is now laid, will permit, the surface of such streets and avenues inside the rails of all tracks, authorized to be laid prior to May 6th, 1884, and between the tracks and rails of such tracks, and for a space two feet in width outside, and adjoining the outside rails of the tracks of an yand all extensions or branches of any railroad authorized to be constructed since May 6th, 1884, shall be put in good and thorough repair by the company, under the direction of the executive board of said city * * *"

(Record page 36, Finding 11.)

After the decision of Court of Appeals in the *Conway Case,* litigations arose between the city and Rochester Railway Company, relative to claims for pacving in streets in which the Company had obtained its franchise and constructed its road prior to 1884 and in streets in which it had so constructed and obtained its franchise after 1884. The Legislature passed a large number of special acts assessing upon the property of the railroad company the expense of all of these pavements. An action was pending in the Circuit Court of the United States, brought by the Railway Company against the city, to have such acts declared void. (*Record pp. 52, 53.*)

Thereafter and on April 26th, 1901, the Legislature passed Chapter 562 of the laws of that year. Under and pursuant to it the city of Rochester and Rochester Railway Company entered into a contract, which is set forth in full in *Finding 27, pp 53 to 61 Record.*

In and by such contract all of such claims were adjusted and compromised for the sum of $386,632.46 and a large amount of interest was thrown off by the city and arrangement made to pay a certain amount thereof in instalments, the amount of claim being made up of the costs of pavements constructed by the city in streets in which the railroad was constructed both before and after May 7th, 1884.

By the third paragraph of such contract, found at page 55, Record, it is expressly agreed that as to all claims for pavements made thereafter in any streets in which Rochester City and Brighton had obtained its franchise or constructed its road prior to the 7th day of May, 1884, the question of liability of the Railway Company to pay

for making such pavements, should be litigated and determined finally in a court of competent jurisdiction, such liability not being conceded by the Railroad Company and it being expressly agreed that such question should be judicially determined.

Pursuant to such agreement this action is brought for making pavements thereafter in two streets in which the Rochester City and Brighton Railroad Company obtained its franchise and constructed its road prior to May 7, 1884.

The Rochester City & Brighton Railroad Company obtained its franchise and constructed its railroad under the provisions of the act of 1869, in both of the streets referred to in the complaint long prior to the 6th day of May, 1884. (*Record, page 67.*) The city of Rochester in the years 1901 and 1902 paved both of these streets and served the notice required by section 98 of the Railroad Act upon the defendant, requiring it to put in repair the pavement between its tracks, the rails of its tracks and two feet outside, pursuant to the provisions of the Railroad Law. The defendant refused to comply with the city's notice and the city made the repair or new pavement itself, and expended the moneys referred to in the complaint.

SPECIFICATION OF ERRORS RELIED UPON.

The assignments of error which give rise to the contention of the defendant in error, are found at pages 112 to 114 inclusive, of the record, and are as follows:

> "I. The Court erred in holding that Chap. 34 of the Laws of the State of New York for the year 1869, in connection with the ordinance of the City of Rochester passed June 24, 1862, as amended by the ordinance of said City passed January 12, 1869, together with the acceptance by the Railroad Company, and its performance of the conditions, did not constitute an inviolable contract beyond the power of the Legislature to alter, amend or impair.
>
> "II. The Court erred in holding that even if such Act, in connection with such ordinances and acceptance, and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City & Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company and

did not pass to the plaintiff in error, by virtue of the merger by the plaintiff in error of all of the estate, property, rights, privileges and franchises of said Rochester City & Brighton Railroad Company made under and by virtue of the provisions of Chap. 254 of the Laws of the State of New York of 1867, as amended by Chap. 503 of the Laws of the State of New York for the year 1879.

"III. The Court erred in holding that Chap. 565 of the Laws of the State of New York for the year 1890, as amended by Chapter 676 of the Laws of 1892, and Chapter 933 of the Laws of 1895, did not violate the provisions of Subdivision I of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it repealed or assumed to repeal so much of Chapter 34 of the Laws of 1869 as exempted the Rochester City & Brighton Railroad Company from paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

"IV. The Court erred in holding that said Chapter 565 of the Laws of the State of New York for the year 1890, as amended as aforesaid, did not violate the provisions of Section I of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it repealed or assumed to repeal so much of Chapter 34 of the Laws of 1869 as exempted the Rochester City & Brighton Railroad Company from paying for any part of the aforesaid new pavements.

"V. The Court erred in holding that said Chapter 565 of the Laws of 1890 as amended as aforesaid, did not violate the provisions of Subdivision I of Section 10 of Article I of the Constitution of the United States, which provides that no state should pass any law impairing the obligation of contracts, in so far as it imposed or assumed to impose upon the plaintiff in error the duty of paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

"VI. The Court erred in holding that said Chapter 565 of the Laws of 1890, as amended as aforesaid, did not violate the provisions of Section I of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person or property without due process of law, in so far as it imposed or assumed to impose upon the plaintiff in error, the duty of paying for any part of the aforesaid new pavements."

The writ of error in this case was properly directed to the Supreme Court of the State of New York, and not to the Court of Appeals, in

view of the practice in that state, for the latter court, the highest court of the state, to remit its judgment, together with the record to the Supreme Court, where the final judgment was entered, and in which the record remains.

Tinker vs. Colwell, 193 U. S. 473.
Wedding vs. Meyler, 192 U. S. 573, 581.
Crossman vs. Lurman, 192 U. S. 189, 195.

The jurisdiction of this Court to hear and determine this controversy, presented by the assignments of error, duly appears in the record. The invalidity of the statute, as being repugnant to the contract clause of the Constitution of the United States, and to Section I of Article 14, was drawn in question in each case by the use of appropriate language in the Answer of the Plaintiff in error.
(Record page 15).

And the prevailing opinion of the Court of Appeals found at page 97 of the record, clearly denied the right claimed by the plaintiff in error, under the Federal Constitution.

This Court will examine the opinions of the Court below, to ascertain the ground upon which the decision assailed was put, when such opinions are properly certified in accordance with the provisions of Rule 9.

Fullerton vs. State of Texas, 196 U. S. 192.
Henkel vs. City of Cincinnati, 177 U. S. 170.
Dibble vs. Bellingham Bay L. Co. 163 U. S. 63.

As to the non-federal questions argued in the Courts below, the decision of the Supreme Court of the State of New York, both at Trial Term and in the Appellate Division, were unanimously against the contention of the defendant in error (*Record pp. 89, 90, 94*), and the Court of Appeals reversed the judgment solely upon the ground that the provisions of the Railroad Act did not infringe the provisions of the Constitution of the United States invoked, and upon no other ground.

The only notice taken of the other questions, was in the dissenting opinion of Judge Gray, who held against the defendant in error upon those questions (*Record pp. 107, 108, 109*). Briefly they were: That the plaintiff in error and its predecessor, the Rochester City &

Brighton Railroad Company, had waived their contract right, by proceeding to extend, under the provisions of Chapter 252 of the Laws of 1884, and under the provisions of the General Railroad Act of 1890; that the plaintiff in error had waived its contract right by entering into and executing the contract between plaintiff in error and defendant in error, bearing date December 31st, 1894, and found in Finding 25, pages 49 to 52 of the Record.

These questions are not here, but within the meaning of the decisions of this court the federal questions alone are presented.

Murdock vs. Mayor etc. of M. 87 U. S. 590.
Wood Machine Company vs. Skinner, 139 U. S. 293.
Beaupré vs. Noyes, 138 U. S. 397.
Johnson vs. Risk, 137 U. S. 300.

In the last case, Chief Justice Fuller, quoting from *DeSaussure vs. Gaillard, 127 U. S. 216*, states the rule:

> "It must appear affirmatively, not only that the federal question was presented for decision by the highest court of the State of New York having jurisdiction, but thit its decision was necessary to the determination of the cause, and that it was actually decided * * *" Again, the Court further said: "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because when put to inference as to what points the state court decided, we ought not to asume that it proceeded on a ground clearly untenable."

It does appear, upon the record here, that the highest court of the state put its decision solely upon the federal question, and that alone.

Therefore, no discussion of these questions will be made here by the plaintiff in error.

The statement in the opinion of Chief Judge Cullen, at the end of the opinion (Record page 101), as follows: "The other questions presented on this appeal are disposed of by our decision in the Conway case, and therefore do not require examination," necessarily did not refer to any of the questions herein suggested, as being non-federal. An examination of the case of *Conway vs. City of Rochester, 157 N.*

Y., 33, will show that the only questions there for determination were the two questions certified by the Apellate Division and included in them was the question whether the language of the General Railroad Act "have and keep in permanent repair" meant repairing existing pavements or making new pavements, and the court held that it meant the making of new pavements.

Upon the argument of this case in the Court of Appeals, counsel for the plaintiff in error argued at length that the decision in the Conway case was wrong and ought to be re-considered, inasmuch as the court had overlooked the saving clauses contained in the General Street Railroad Act, Chapter 252 of the Laws of 1884, and the General Railroad Act of 1890, and that was the court's answer to that contention. Again that neither the City of Rochester or the Executive Board, which were the only defendants in that action, could raise the constitutional question or be permitted to argue it, had been distinctly settled by the Court of Appeals in *People vs. B. F. & C. I. R. R. Co., 89 N. Y. 75.*

The two questions, plainly and squarely presented, by the Answer, and by the opinions of the Court of Appeals, are, *first,* does the General Railroad Act of the State of New York, in its application to the plaintiff in error, as to those streets in which it obtained its franchise and constructed its road, prior to the passage of Chapter 252 of the Laws of 1884 of the State of New York, violate the provisions of the federal constitution? *Second,* was the exemption from making pavements in such streets, granted by Chapter 34 of the Laws of 1869, construed in connection with the city ordinances, personal to the grantee, or did it pass under the merger to the plaintiff in error?

The doctrine has become settled, beyond question, in this Court, that where the claim is, that a state statute has created an inviolable contract, and the highest court of the State determines that no contract has been created, this Court will determine for itself, whether or not the alleged contract exists, and whether its obligation has been impaired by subsequent state enactment.

> *Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543.*
> *Douglas vs. Kentucky, 198 U. S. 488,* and numerous cases cited in the opinion at pages 502, 503.

Equally well settled, in this Court, is the rule that this Court will

construe the state statute, under which it is claimed that the contract rights passed by assignment or merger, and itself determine whether the language of the statute is broad enough to permit such transfer, and whether the original contract was of a nature, the rights under which might be transferred or assigned.

See cases cited under Point III in this brief.

POINTS.

I.

THE GENERAL RAILROAD ACTS, IN IMPOSING LIABILITY UPON THE PLAINTIFF IN ERROR AND THE RAILROAD AND PROPERTY OF THE PLAINTIFF IN ERROR FOR THE PERMANENT IMPROVEMENT OF THE STREETS MENTIONED IN THE COMPLAINT, IMPAIR THE OBLIGATION OF THE CONTRACT EXISTING BETWEEN THE PLAINTIFF IN ERROR, AND THE STATE OF NEW YORK, AND THE CITY OF ROCHESTER, RELIEVING PLAINTIFF IN ERROR FROM LIABILITY TO PAY OR BEAR ANY PORTION OF SUCH EXPENSE.

The question here, is, assuming that the Railroad Law, as construed by the Court of Appeals of the State of New York, was intended by the Legislature to repeal the exemption contained in chapter 34 of the laws of 1869, and deprive the Rochester Railway Company of any benefits thereunder, is such act constitutional, or does it violate the provisions of the Federal Constitution, which declare that no state shall pass any law impairing the obligation of contracts?

Under the allegations of the answer and conceded facts it does not admit of question under the decisions of the New York Courts enunciated before the passage of the general railroad act of 1890, that at the date of the passage of the acts under consideration there existed between the State of New York, City of Rochester and the Brighton Railroad Company, a contract to the effect that the Railroad Company should not be required to bear any part or portion of the expense of a new or permanent improvement of any of the streets, through

which its tracks were laid, or should thereafter be laid under the provisions of the Act of 1869.

The Brighton Railroad Company was incorporated under the General Railroad Law of the State of New York of 1850. Incorporation under that act did not of itself confer the right to construct and operate a railroad in and upon or across any streets in any city without the assent of the municipality. (Laws of New York of 1850, Chapter 140, Section 27, Subdivision 5.)

This subdivision which furnished the sole authority for constructing a railroad in the streets of a city was as follows: "To construct their road across, along or upon any * * * street, highway * * *. Nothing in this act contained shall be construed to authorize * * * the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city."

Thus, by the provisions of the General Railroad Act of 1850, the consent of the municipality is made a condition precedent to the enjoyment of a franchise to construct and operate a railroad in the streets of a city.

In the case of the Brighton Railroad Company the corporation of the city of Rochester in its original resolution of consent in 1862, imposed upon the Brighton Railroad Company as one of the conditions of its assent, the obligation to permanently improve and keep in repair the portion of the streets between the rails and for two feet four inches outside thereof.

Upon the foreclosure of the mortgage upon the franchises and property of the Brighton Railroad Company, and the incorporation by the purchaser and his associates of the new corporation under the same name, application was made to the Common Council for a modification of these conditions, and the second section of the ordinance of 1862, imposing the obligation to improve and repair was modified, upon the representations of the company, that the conditions were so onerous as to prevent the new corporation from proceeding with the operation of the railroad, subject to such condition, owing to the fact that the road had never paid because of the existence of such conditions.

This modification was made on the 12th day of January, 1869, by amending the last clause of section 2 of the ordinance of 1862, so that

it only imposed upon the new corporation the obligation to keep the street between its tracks and for one foot outside in repair for five years from the 12th day of January, 1869, and relieved it from the obligation to make any port or portion of a new and permanent improvement of the streets for five years, and modified section 6 of the original ordinance by reducing the rate of fore for children under twelve years of age from five to three cents.

Further negotiations followed between the Brighton Railroad and the City of Rochester, which resulted in the company accepting an obligation always to keep the streets in repair, upon it being relieved from any obligation to pay the expense of any new or permanent improvement.

This was accomplished by the preparation of an act which was agreed upon by the Common Council and approved by the Mayor of the city, and the Brighton Railroad Company, and transmitted to the Legislature of the State of New York for enactment by it. (*Exhibit A, annexed to the answer, Record page 17.*)

By the 5th section of this act it is provided as follows:

> "Sec. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the common council of said city of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense, thereof, but it shall make its rails in such street or streets conform to the grade thereof."

And the act, by the fourth section thereof, approved and ratified the amendment to section 6 of the ordinance of 1862, made by the Common Council in 1869, by reducing the rate of fare of children under the age of twelve years from five to three cents.

Since the passage of the Act of 1869, on February 27, 1869, neither the Brighton Railroad Company nor the defendant as its successor has ever been assessed for or required to pay any portion of the expense of the permanent improvement of any portion of any street, avenue or highway included within its route until after the decision in the *Conway case.*

Whether the conditions attached by the Common Council to its

consent to the construction and operation of the railroad of the Rochester City & Brighton Railroad Company, in the streets of the city, when accepted and acted upon by the railroad company, constituted a binding and inviolable contract between the city and the railroad company, depends entirely upon the question whether the Legislature by virtue of the Act of 1850, under which the railroad company was incorporated, gave power to the city to make such conditions, or whether it vested it simply with power to give the naked consent without any conditions.

And the same reasoning applies to the amendments to the ordinance of 1862, passed by the Common Council on the 12th of January, 1869.

It was very early held in New York that a city could not, under existing statutes, confer upon individuals the right to lay railroad tracks in the city streets, nor could it make with individuals, although the purpose of such individuals thereafter to become a corporation was expressed, a binding contract for the laying of such rails, nor could it grant to them a franchise.

People vs. Sturtevant, 9 N. Y. 273.
Milhau vs. Sharp, 27 N. Y. 611, 620.

In the very late case of *Potter vs. Collis, 156 N. Y. 16,* it was held that a resolution of the Common Council of the City of New York, passed July 30, 1851, undertaking to authorize certain individuals to construct a railroad in specified streets and avenues, upon certain conditions, the individuals subsequently organizing as a corporation, was beyond the power of the Common Council and void, whether considered as a grant of a franchise or as a license.

In the opinion in that case by Judge Gray, no stress seems to be laid upon the fact that the franchise was granted to individuals who subsequently were to organize a corporation and, as we read the opinion, the court held that under the act of 1850 the Common Council could simply give its consent to the construction of the road, without any further binding conditions. After holding that the grant to the individuals was void, the court at page 30 of the opinion uses this language: "All that the municipal corporation could do within the provisions of the General Railroad Act of 1850, was to assent to the construction of a railroad."

All of the franchises and property of the R. C. & B. R. R. Co. were

mortgaged, the property sold under the mortgage and a new corporation organized which took over all of its franchises and property.

But the question is here more academic than real, because if it should be held that the act of 1850 did not authorize the Common Council to annex conditions to their consent to the construction of the road in the city streets, which when accepted became an inviolable contract, the act of 1869 was an express grant by the Legislature to the Rochester City & Brighton Railroad Company of a franchise and right upon certain conditions specified in the act itself, which to some extent re-enacted the provisions of the ordinance itself, and to the extent that the act of 1869 re-enacted the provisions of the ordinance of 1862 as amended in 1869, it directly validated the ordinance to that extent and made it a binding contract.

A careful reading of the provisions of chapter 34 of the Act of 1869, will show that the act itself does not assume to validate or confirm the resolutions of the Common Council, except only to the extent that it specifically re-enacts them. Section 6 of the act cannot be construed as validating or confirming anything. Its language is as follows: "This act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the city of Rochester entitled, * * * except as is herein specifically provided."

The intention of the Legislature appears to have been to grant the franchise granted by the act, subject to the conditions imposed by the act and to leave the question of the validity of the remainder of the resolutions and ordinances to be determined by existing statutes, and neither add to nor take from them except as specifically enacted.

The record shows very clearly (see *Finding 9, Record page 35*), that the act of 1869 was the result of the joint application of the railroad company and the City of Rochester to the Legislature, and both parties assented directly and clearly to any changes, which the act as passed, made in the existing ordinances, and the act came into life with the consent of the Legislature by agreement between the city and the railroad company and neither was in a position to question its legality or its constitutionality.

It was well settled law in the State of New York that the resolutions of the Common Council which are authorized by the Legislature

consenting to the use of the streets of a city by a railroad corporation, when accepted by the corporation constitute a contract.

Brooklyn Central Railroad Company vs. Brooklyn City Railroad Company, 32 Barb. 358.
People vs. Sturtevant, 9 N. Y. 273.
Milhau vs. Sharp, 27 N. Y. 611–620.
People vs. O' Brien, 111 N. Y. 1.

In the case of the *Brooklyn Central Railroad Company vs. The Brooklyn City Railroad Company* (*32 Barbour, 358*) it is said, speaking of the resolutions of the Common Council of the City of Brooklyn, granting its assent to the construction of a railroad, "the resolution * * * constituted a contract which the company was bound to perform, and which the Common Council could not rescind without adequate cause." (*p.* 364.)

Again on page 366 of the same case, reference is made to the observations upon the same question by Chancellor Kent, as follows:

> "Speaking of franchises, Chancellor Kent, in his commentaries, says (vol. 3, p. 458), 'they contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant, without breach of the contract.'"

In *People vs. Sturtevant* (*supra*) the resolutions of a common council assenting to the construction and operation of a street surface railroad were held not to be an exercise of the legislative power, but that it was a grant upon condition (*p.* 273), and continuing, the court observes:

> "Should it even be conceded, that the resolution in question was partly legislative in its character, another part was most clearly a matter of agreement or grant."

In *Milhau vs. Sharp* (*27 N. Y. supra*) at page 620, the court, in considering a resolution of the Common Council of the City of New York granting authority to construct and operate a railroad, says:

> "It was not, as has been insisted, an act of legislation, but on

> the contrary, it possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of *The People vs. Sturtevant* (*9 N. Y. 273*), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior to its acceptance by the defendants, the resolution was only a proposition, having no binding force whatever. It was certainly not then a law, and since that time the common council have taken no action upon it. Upon its acceptance (if valid), it became a contract between two parties, binding each to the observance of all its provisions. * * * The defendants' counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the common council. This position cannot be reconciled with the decision in *The People vs. Sturtevant* (*supra*), nor with the principle declared by the Supreme Court of the United States in the *Dartmouth College Case* (*4 Wheat. 519*), and other kindred cases, in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants."

In *People vs. O'Brien* (*supra*) the court, in considering the effect of a resolution of the Common Council granting to a street surface railroad corporation the right to construct and operate its railroad upon Broadway, says:

> "We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the Legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co. vs. Kerr, 72 N. Y. 330; People vs. Sturtevant, 9 id. 293.*)"

It is plain, therefore, beyond all question, that subsequent to the passage of the Act of 1869, there existed between the State of New York, City of Rochester and the Brighton Railroad a valid agreement exempting it from liability for the expense of permanent improvement of the streets.

The law must be regarded as settled in New York that a municipal corporation cannot make a binding contract with any street railroad company to occupy its streets in any particular manner except by au-

thority of the Legislature. The right to occupy the streets comes from the Legislature and a municipal corporation only acts by virtue of the powers delegated to it by the Legislature. Such a contract is, therefore, subject to the right of the Legislature to alter or change it, unless the Legislature shall see fit to ratify such a contract by express legislation, and upon the faith of such a contract the railroad company expends its money, and puts itself in a position from which it cannot retreat without financial loss.

Davis vs. Mayor of New York, 14 N. Y. 506.
Milhau vs. Sharp, 27 N. Y. 611.

The Courts of the State of New York had therefore settled the doctrine, long prior to the passage of the Railroad Act of 1890, that a franchise granted to a street railroad corporation to use the public streets in a city, granted either by the municipality acting by authority of the state legislature, or granted directly by the state, acting without the intervention of the municipality, constituted property, and its burdens and benefits annexed to the grant constituted an inviolable contract which it was beyond the power of the state legislature to alter or amend in any substantial particular. Having adopted this doctrine, the decisions of the highest court of that state became a rule of property, and it was not competent either for the legislature to injure materially the value of such property by altering its benefits or burdens to the detriment of the grantee, nor is it competent for the highest court in the state, by judicial determination, to overturn, alter or amend such rule of property, by subsequent decision. This is the settled doctrine of this court.

Citizens Bank vs. Parker, 192 U. S. 73, 81.
Potter vs. Hall, 189 U. S., 292, 298, 300.
S. P. R. R. Co. vs. Bell, 183 U. S. 675, 685.
Muhlken vs. R. R. Co. 197 U. S. 544, 570.
Detroit vs. D. C. St. R. Co. 184 U. S. 368.
Olcott vs. Supervisors, 16 Wall. 678, 690.
Taylor vs. Ypsilanti, 105 U. S. 60, 71.
Los Angeles vs. City W. Co. 177 U. S. 558, 575.

We have here, therefore, an express grant of a franchise by the City of Rochester, acting under the authority of the Legislature, as given by the General Railroad Act of 1850, granting a franchise to the

Rochester City & Brighton Railroad Company in 1862. We have the amendment to that franchise of 1869, when the second Rochester City & Brighton railroad came into existence and succeeded to the rights and franchises of its predecessor. We have the Act of 1869, either granting a new franchise to the Rochester City & Brighton Railroad Company, or confirming and modifying in specific particulars, the existing franchise, imposing new burdens and extending new benefits, for a length of time co-ordinate with the length of time that the burdens were to be borne, namely, the unexpired term of the charter.

We have the case of the Company accepting the franchise and acting under it for many years, extending its road and complying with all the conditions of the Act of 1869. We have the transfer of this property right to the plaintiff in error, under the merger acts, and its compliance with all the provisions of the Act of 1869; its acceptance of those provisions and its expenditure, upon the faith of those provisions, of nearly four millions of dollars. We have the practical construction placed upon the contract by the state and city authorities, extending from 1869 to 1897, without a question raised that the railroads, and both of them, were exempted from paving between the tracks and two feet outside, in all the streets in which the franchise was obtained and the road constructed, prior to the 7th day of May, 1884, the date of the passage of the General Street Railroad Act. The State of New York now seeks, under the provisions of the General Railroad Act of 1890, as construed by the highest court of that state, to strike down benefits annexed to this franchise, and enforce to the letter the burdens imposed by it.

That this cannot be done, has been expressly adjudicated by this Court in many cases which we now desire to consider.

City of Chicago vs. Sheldon, 9 Wall. 50.

The foregoing case was much exploited by counsel for the plaintiffs in error, in the so-called "New York Franchise Tax Cases," reported in *199 U. S., 1,* and the facts in, and the doctrine of the case, are familiar to the Court.

The Common Council of the City of Chicago granted to the North Chicago Railway Company, on the 23rd day of May, 1859, the right to construct a railroad in certain streets of that city. Among the conditions contained in the grant, was the following:

"The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of the streets upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway, on all the streets wherever one track is constructed and sixteen feet in width along the line of said railway, where two tracks are constructed, in good repair and condition, during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof, may be adopted by the Common Council."

After this contract was made and carried into execution, and up to the year 1866, the Common Council passed several ordinances for the improvement of several of the streets occupied by the railroad company. None of the expenses of the improvements were assessed upon the railroad company.

In the year 1866, the proprietors of certain lands fronting on the street where the railroad was laid, refused to pay the assessment made upon them, upon the ground that the railroad ought to be assessed for the improvement.

The Supreme Court of Illinois held that the Legislature could not constitutionally grant the power to the city to make such a contract or grant such a franchise, and that as a consequence the city was bound to assess the railroad company. A special assessment of $28,677 was imposed upon the property of the railroad company and the stockholders of the company. A stockholder, the Company itself having declined to act, filed a bill to enjoin the collection, and the court enjoined it accordingly, and from that decree the City of Chicago brought error to this court.

This court held that the grant of the franchise by the city, acting under the authority of the Legislature, was within its powers and constituted a contract, and that the practical construction put upon the contract, during the seven years from 1859 to 1866, was almost conclusive as to its meaning, if any doubt existed. And from the opinion of Mr. Justice Nelson we quote as follows:

"A contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its Legislature to pass an act impairing its obligation, much less could any decision of its court have that effect."

In the franchise tax cases, this court, speaking through Mr. Justice Brewer, and referring to the Sheldon case, said:

> "An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc., of the streets upon which its railway was authorized to be constructed. The Company having accepted, complied with the terms of the ordinance. The city attempted by assessment for special improvements, to compel the railroad company to pay for further work of the nature required by the original ordinance, and it was held that the obligation assumed by the railroad company in respect to street improvements as provided by the ordinance, could not be increased by special assessments for further improvements, *but this involved no question of liability to general taxation, and only held void the effort of the city*, under the guise of city assessments, to increase the obligation specifically assumed by the railway company under the original ordinance."

In the franchise tax cases, when they were before the New York Court of Appeals, Judge Vann, delivering the opinion of the Court, used the following language, which was approved by this Court when the cases were before it:

> "Special franchises were not taxed until by the Act of 1899, amending the Tax Law, they were added to the other taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. *No part of the grant was changed. No stipulation altered. No payment increased, and nothing exacted from the owner of the franchise.* No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of the government."

It is respectfully urged, that this language is decisive upon this particular question. Granting that the Act of 1869 was an exercise of the power of taxation, both by imposing conditions and relieving the Railroad Company from doing a specific thing, the railroad acts, by repealing that part of the statute which contains the exemption from making new payments, in the language of Judge Vann, and that of Mr. Justice Brewer, does change a part of the grant, does alter the stipulation, does increase a specific payment, and does exact from the

owner of the franchise a particular thing, which the state promised that it would not exact. And this, although it might be questioned here, that the State has reserved to itself its general powers of taxation, that it may impose taxes upon this railroad, with others, to the extent of the value of all its property.

At the risk of repetition of what has already appeared, we wish to emphasize that the Chicago ordinance was a franchise containing conditions, granted to a street railroad company under the authority of the Legislature of Illinois. The construction of this ordinance, that it exempted the Railroad Company from making new pavements, had to be spelled out of the ordinance and supplemented by the practical construction placed upon the ordinance by the city and the Railroad Company, during the period of seven years, and yet this Court, construing the ordinance in the light of its own reason and jurisdiction, and not as construed by the state courts, held that it was a contract and did specifically exempt the Railroad Company from making new pavements.

In the case at bar, the State either by granting a franchise in toto or by amending one already granted and imposing additional conditions which were accepted, specifically said, in language admitting of no misconstruction, that the Railroad Company should not be required to do a particular thing which the general railroad acts say, in so many words, that it must do. And in addition, the practical construction placed upon the meaning of the language used in the Act of 1869, extended not over seven years, but over twenty-eight years.

Laying down the doctrine of the Sheldon case, are the following cases decided in this Court:

Detroit vs. Detroit C. S. R. R. Co., 184 U. S. 368.
City of Cleveland vs. C. C. Ry. Co. 194 U. S., 517.
Pearsall vs. Gr. Northern Ry Co., 161 U. S., 646.
(Opinion, 660–668.)
L. S. & M. S. R. R. Co. vs. Smith, 173 U. S., 694.
New Jersey vs. Wilson, 7 Cranch, 164.
Dodge vs. Woolsey, 18 Howard, 331.
McGee vs. Mathis, 4 Wall. 143.
Farrington vs. Tennessee, 95 U. S., 679.
Asylum vs. New Orleans, 105 U. S., 362.
Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543.

The latter case is the last expression by this Court upon the question involved at the time of the making and printing of the brief. This Court there held, that a statute of the State of Michigan, impaired a contract obligation, with the defendant in error, by the imposition of a different tax than the one prescribed in the contract. The defendant in error, pursuant to an Act of the Michigan Legislature, purchased the rights, property and franchises of a railroad, chartered under an Act of the Legislature of Michigan. By an Act of the Legislature of the State of Michigan passed February 13th, 1855, being the Laws of 1855, page 305, the authority to purchase was given and Section 9 of the Act provided: "The said Company shall on or before the first day of July, pay the state treasurer an annual tax of ten per cent. on the capital stock of said Company, paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon such Company by its act of incorporation, or any other law of this State. A State tax shall be estimated upon the last annual report of such corporation."

The Constitution of the State of Michigan, adopted in 1850, contained the exact clause, authorizing the alteration, amendment or repeal of charters, which is contained in the New York Constitution, a point which will be noticed further on. This Court held that the statute in question, acted upon by the Company named in the Act, and by its successors, succeeding to its *rights, franchises and property*, constituted a contract, which could not be impaired by subsequent legislation.

We desire to quote from the opinion of Justice Brewer:

> "Surely no clearer case of contract can be presented than one in which the Legislature passes an Act in respect to a particular corporation, making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation, and the condition of an unfinished road, whose completion is deemed of great importance, and where the franchise, is, as required, formally accepted, the expenditures made, and the road completed."

Justice Brewer then states that the suggestion is made that the provision is not in terms made perpetual and he states that a suf-

ficient answer is found in the opinion in *Home of the Friendless vs. Rouse, 8 Wallace, 437*, which he quotes as follows:

> "Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation' are the words used in the Act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the Legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could at its will resume the power of taxation."

The Court will bear in mind that in the case at bar, the contract is with a single corporation, and it is a contract to exempt it from a specific and particular thing. Therein lies the distinction between this case and the numerous cases cited by the Chief Judge of the Court of Appeals in his prevailing opinion.

We also cite in this connection:

New Jersey vs. Yard, 95 U. S., 104.
Home of the Friendless vs. Rouse, 8 of Wall., 450.
Washington University vs. Rouse, 8 of Wall., 439.

In all of the above cases, the State distinctly made a contract to exempt from taxation, to a certain extent, property of the defendant in error, in the first case, and of the plaintiffs in error in the two other cases; and the contracts were, in the several cases, held to be inviolable, and beyond the power of the State to alter, amend or abrogate.

In the New Jersey case, the statute required a written acceptance, which was given. In the Rouse cases, the only acceptance required or given was the action by the plaintiffs in error, in the several cases, in proceeding to invest their capital upon the faith of the promise.

In the Rouse cases, this Court reiterated the rule long established, that it was within the power of the state legislature to exempt the property of an individual or corporation, from taxation, either for a specified period or permanently, and approved the doctrine as laid down in the Dartmouth College case.

based solely upon the broad ground that a state legislature did not possess the power to exempt any property from taxation, but that doctrine has never obtained in this Court. But from that dissent doubtless flowed the doctrine now recognized, that all such exemptions will be strictly construed and nothing taken by implication.

In the Rouse cases, as before said, the statute required no written acceptance, and the acceptance consisted simply in acting under the statutes and expending money in erecting buildings and entering upon the execution of the charitable purposes contemplated. The language of Mr. Justice Davis, in delivering the opinion of the court, already appears at page 28 of this brief, quoted by Mr. Justice Brewer.

It was argued in the Court below, by the counsel for the defendant in error here, although the Court of Appeals did not, in its opinion, notice the contention, that the ordinance of 1862, as amended by the ordinance of 1869, and the Act of 1869, and the acceptance of the Act, and all these ordinances by the Rochester City & Brighton Railroad Company did not constitute a contract; at least that the Act of 1869 did not extend the time of five years as provided by Section 2 of the amended ordinance of 1869, but intended to leave that limitation of time in full force and effect. The cases hereinbefore cited are a sufficient answer to this contention. But as to the five-year limitation, we say: It would seem very clear that the intention of the City of Rochester and of the railroad company, when they together prepared the act and sent it to the Legislature for passage, and the intention of the Legislature in passing it, was to dispense with the limitation of time of five years during which the railroad company was to make repairs, and during which time it was to be exempt from paying any part of the expense of a new pavement.

The construction claimed would be at war with the language of the act itself, and with the expressed intention of both the city and the railroad company in formulating the act, and sending it on for passage, and at war with the practical construction placed upon it by both the city and the railroad company, clear up to the time of the decision of the *Conway case*.

The purpose of the act was to make both its burdens and benefits applicable to the railroad company during the unexpired term of its charter.

That this is the only construction that can be placed upon it, a careful examination of each provision of the act will demonstrate. Section 1 grants a franchise to the railroad company to maintain and operate a railroad in all of the streets of the city, in which it has a track laid at the time of the passage of the act, and further, with the permission of the Common Council to lay a track, and maintain and operate a railroad in such other streets in the city as it should elect to use for that purpose, with the permission of the Common Council, and with the same consent to lay a double track in any street or streets where it has a single track.

The company was organized, as appears by its articles of association, to continue for ninety-nine years, and the franchise not being limited in any way must have been intended to be for the unexpired term of the charter. Consequently the conditions subsequently annexed to the franchise by the succeeding provisions of the act must, unless expressly limited, have been intended to exist as long as the franchise. Section 2 of the act provided for the abandonment of tracks in certain streets. Section 3 invested the defendant with the power of eminent domain. Section 4 fixed absolutely, during the unexpired term of the company's charter, the rate of fare. Section 5 is the section in question and was intended to be a condition to exist as long as the life of the franchise and the charter.

Assuming that the Legislature intended to grant a franchise in all these streets of the unexpired term of the company's charter, and then to provide that at the end of five years it should be under no obligation whatever to repair the streets or any part of them in which its track was laid, would absolutely relieve the railroad company from any liability, either to repair or to make new pavements, because section 2 of the ordinance of 1869 absolutely repealed and took the place of section 2 of the ordinance of 1862, and no part of section 2 of the ordinance of 1862 remained in life after the adoption of the amendment of 1869; giving the act then the construction contended for by the appellant's counsel, and it necessarily results in the conclusion that the Legislature intended that at the expiration of five years, the railroad company was to be relieved from the burden, not only of making pavements, but even of making repairs. Such a construction is absurd. Further under the amended ordinances the repairs were to be made between the tracks and *one foot* outside. By Section 5 of the act the

repairs were to be *between the tracks only*, and then is the construction placed upon the section by both parties for twenty-eight years.

We now desire to examine, with some care, the opinion of the majority of the Court of Appeals. As before said, the Court held, first, that neither the ordinance of 1862 as amended in 1869 together with Chapter 34 of the Laws of 1869, constituted an inviolable contract between the city or the State of New York, and the Rochester City & Brighton Railroad Company.

That the Act of 1869 was but the exercise of the state's taxing power, and it had the right to alter, amend or repeal it. *Second*, that even if the Act of 1869, constituted a contract, the exemption from making pavements was a privilege personal to the Rochester City & Brighton Railroad Company, and did not pass to the plaintiff in error, under the merger effected in 1890.

The prevailing opinion argues that the Act of 1869 was not the grant of a franchise made directly by the Legislature, but that the franchise was granted by the ordinances of 1862 and 1869, and the Act was a regulation thereof. Many cases in this and other courts are cited by the learned judge to sustain his contention under the first subdivision here noticed. And it becomes necessary to examine, with some care, the doctrine upon which these cases rest; and first, as to the materiality of the question, whether the Act of 1869 was the direct grant of a franchise, or whether it was an exercise of the power of taxation, and merely amended or altered an existing franchise.

Clearly the City had power, under the Act of 1850, to grant the franchise. Whether it had any power to impose conditions has never been directly determined by the Court of Appeals and was not determined by its decision in this case. Whether the Railroad Company, having accepted the franchise and acted under it, would be estopped to dispute the validity of the conditions imposed, is a question not necessary to discuss.

In any event it appears without dispute, that both parties appealed to the Legislature and that appeal resulted in the passage of the act.

Now whether the Railroad Company already had its franchise or whether the franchise must be deemed to have been granted by the Act of 1869, is immaterial. The original franchise of 1862 named certain streets in which the Company might operate, and no others, and named the particular parts of such streets in which the Company

might operate. The Act of 1869 expressly empowered the Railroad Company to maintain and operate a railroad in all of the streets of the City in which it at that time had a track laid. If this were not the granting of a franchise it was at least the confirmation of an existing franchise and the Legislature proceeded to prescribe the conditions upon which the rights granted should be exercised. It also granted the right to the Railroad Company to maintain and operate a railroad in all other streets in the City that it should elect to use, with the consent of the Common Council. It is very clear that when it did extend in the other streets, it became subject to the conditions imposed by the Act of 1869. With the same consent it was authorized to lay a double track in any street or streets, where it had a single track, and the first section of the act provided that it should not be bound or required to construct and operate a railroad in any street of the City where there is now no track.

This relieved it from any forfeiture of its charter, which under the Act of 1850 might have taken effect on account of its omission to construct in all the streets named in the original franchise.

The significance of the decision of this Court in *Worcester vs. Worcester Street Railway, 196 U. S., 539*, cited in Chief Justice Culleus opinion, becomes apparent. There this Court held the franchise granted to the Worcester Railway Company, with conditions annexed by the municipality of Worcester, acting by authority of the Legislature, was a binding contract. And further held that with the consent of the Railroad Company and against the wishes and protest of the municipality, the Legislature had the power to alter it in a material particular.

And the decision proceeds upon the theory that the municipality, being a mere political subdivision of the State, and the creature of the Legislature itself, and acting in the making of the contract merely as an agent of the principal, the State itself, the State could alter or amend the contract as it chose, with the consent of the Railroad Company. That the City, acting by virtue of the powers conferred upon it by the State, could not be said to possess a property right in the performance of the conditions imposed by the conditions annexed to the franchise.

Therefore, in the case at bar, whether the conditions annexed to the franchise by the City of Rochester were or were not binding upon the Railway Company and whether or not it took, under the ordinance

of 1862, a perfect franchise, untrammeled by any condition, it does appear that both parties consented that the state should modify any contract that had theretofore been entered into between them and the state did modify the contract, assuming that one existed, or did make a new one, assuming that none had theretofore existed, by the passage of the act of 1869 and the acceptance of that act by the Railroad Company.

The Railroad Company reduced its rate of fare as to children between the ages of five and twelve years, as directed by the act. Whether it was bound to charge this rate of fare, under the conditions annexed to its franchise, has not been determined but there was a question there which was settled by the Legislature. It continued, as appears by the record, to keep in repair the space between its tracks and the rails of its tracks. Whether it was bound to do this under its franchise is immaterial, for the reasons last stated. It accepted the provisions of the act of 1869, by extending its railroad into a large number of streets not named in its original franchise, among which streets were the two streets for the paving of which the present action is brought, and also into a large number of other streets, and expended large sums of money in making such extensions. (*See Record, Finding of Fact 10, pages 36, 37.*)

Starting with the unavoidable concession, that under the doctrine of the Worcester case and under the doctrine of the numerous cases decided in the Court of Appeals and beginning with the *People vs. Sturtevant, 9 N. Y., 273,* if the Common Council of the City of Rochester, possessing the power from the Legislature so to do, had passed the Act of 1869 in the shape of a city ordinance and it had been accepted and acted upon by the Railroad Company, it would have constituted an inviolable contract, and the same exception from the expense of making new pavements, which is contained in the act, if contained in the ordinance calling it an exemption from taxation, or an exercise of the taxing power or police power, or whatever name you may choose to give it, would have still been an inviolable provison, binding upon the city, which concededly passed the ordinance solely by virtue of the power conferred upon it by the Legislature.

Why, when the Legislature steps in and does the same thing in the same language which its agent might by it be authorized to do, is it not, when acted upon, a contract, the same as if it had been in the form of a city ordinance?

In the majority opinion, *182 N. Y., 116*, it is said,

> "The true test of whether there was any consideration for the exemption granted by the statute is whether any acceptance of its terms and provisions was necessary to make it effectual. If not, how can it be said that the exemption is other than a privilege? Here lies the distinction between this case and that of *New Jersey vs. Yard, 95 U. S., 104*. In the case cited the statute of New Jersey required the written acceptance of its terms by the company or else it became wholly inoperative."

In answer to this we say that the New Jersey statute required a written acceptance without which there could have been no contract. Assuming that the statute of New Jersey had not required a written acceptance, but the Railroad Company had gone on upon the faith of the statute and completed its road to Phillipsburg and complied with the condition, would any court have said that because the statute did not require the acceptance in writing there was no acceptance and hence no contract?

In the case at bar had the statute of 1869 required a written acceptance and none had been given, there would have been no contract. It did not require a written acceptance and, therefore, the acceptance by the railroad in acting under it and extending its road under it, constituted an acceptance, constituted a consideration for a binding promise.

Section 5 of the act imposes the duty upon the company to keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair.

Surely, the company having accepted and acted under the provisions of this act could not be heard to say that it was to keep the streets in repair only for a limited time and might, at its own will, repudiate this obligation. The promise upon the part of the state is equally strong, "but *whenever* any of said streets are by ordinance or otherwise, permanently improved said Company shall not be required, etc."

Surely this was a promise to the Railroad Company to exempt it from doing a particular thing, so long as it was bound to do the particular thing or things that constituted the consideration for its promise.

Again, the Court in the prevailing opinion, after referring to the language of the act just referred to, uses this language:

> "This certainly did exempt the Company from any expense of repavement so long as the statute remained in force. But

the question is, did the statute confer upon the company any contract right immune from subsequent recall, or was it the mere exercise by the Legislature of the taxing power, which could at any time be changed, modified or repealed?"

In this connection we concede that the State is never presumed to surrender the taxing power. The Courts require the clearest and most unmistakable statement of such an intention before such a conclusion will be reached, and there are numerous cases which hold that where a particular or specific tax is imposed upon a particular corporation, the power of the State to impose other and different taxes to which all property is subject, will not be presumed to have been surrendered, even although the specific tax may amount to a contract so far as regards that special thing.

The State may not alter the amount of the specific tax, but it may impose other and different taxes.

It may be assumed, as stated in the prevailing opinion, that the Act of 1869 did not, in terms, assume to ratify any existing contract between the City of Rochester and the Railroad Company. Or, on the other hand, it may be assumed that there did exist between the City and the Railroad Company, a valid and binding contract. Then, within the meaning of *Worcester vs. Worcester Railway Company,* cited *supra,* the Act of 1869 either made a new contract with the Railroad Company or it altered and amended an existing contract between the City and the Railroad Company, either act the Legislature had perfect power to perform with the consent of the Railway Company, as determined in the Worcester case. Looking at the situation from either point of view the Legislature exercised its undoubted power in the premises and stipulated with a particular corporation, that in consideration that the Railroad Company would do certain things, the State would refrain from doing certain things.

As shown in the cases cited, it was not necessary to specify any particular length of time, or to use the word "forever," the conclusive presumption being, that the contract was to exist perpetually or during the unexpired term of the Charter of the Railroad Company.

And in this connection counsel desires again to reiterate, that at the time of the passage of the ordinance of 1862 and of the amendment thereto of 1869, and the passage of Chapter 34 of the Laws of 1869,

there existed no general statute imposing upon street railroads any obligation, either to keep the streets or any portion thereof in repair, or to make new pavements in any portion of the streets occupied by its tracks. That matter was purely a question of contract between the several municipalities and the several railway companies, where the municipalities had power from the Legislature to impose such conditions.

In very many of the special charters of railroads passed by the Legislature, prior to the Constitutional Amendment, the State itself prescribed these duties and the extent thereof. The State had adopted no general policy whatever in regard to these matters, nor did they adopt one until the passage of the General Act of 1884, Chap. 252 of Laws of New York for 1884. Therefore, the question of repairs, the question of new pavements in the streets occupied, became purely a question of contract between the parties, to be settled and disposed of as they might agree and if the franchise offered contained provisions too onerous the Railroad Company need not accept.

In this situation of affairs, the Act of 1869 was passed confirming the franchise in the old streets, or granting a new one, as you please, extending the franchise into other streets than those named in the original ordinances, and providing the exact measure of duty upon the part of the Railroad Company in the streets in which it had already built and in the streets in which it was in the future to build. The Railroad Company accepted the provisions of this act, by proceeding to operate its railroad and extend its lines under it. And it is respectfully submitted, by counsel for plaintiff in error, that in the various cases cited in the prevailing opinion and in the other cases cited by counsel, that the doctrine enunciated in the majority opinion of the Court of Appeals is not sustained, but that the weight of au- lays down the doctrine contended for by counsel for plaintiff in thority lays down the doctrine contended for by counsel for plaintiff in error.

There is no doubt but that there exists a wide distinction between upon a particular corporation certain rights and exemptions, and those upon a particular corporation certain rights and exemptions and those where the Legislature has, under a general act, held out inducements to all corporations and individuals to engage in a certain business. Even where a corporation or individual has engaged in a particular business and expended moneys on the faith of the general act, this

Court has held in some particular instances that the act does not constitute a contract; it is a mere expression of the present economic policy of the state and may be changed or altered at any time. Keeping in view this distinction, counsel desires to call the court's attention to certain cases cited in the opinion of the majority of the court of appeals and certain cases analogous to those cited.

Christ Church Hospital vs. Philadelphia, 24 Howard U. S., 300, is a case cited in the majority opinion of the Court below. In that case the Legislature passed an act, which recited that the Christ Church Hospital, an existing corporation, was having its usefulness limited by reason of the decay of its buildings and the increasing burden of taxes, and it was enacted, "the real property, including ground rents now belonging and payable to Christ Church Hospital in the City of Philadelphia, so long as the same shall continue to belong to said Hospital, shall be and remain free from taxes." This was held to be a mere gratuity, a privilege that existed *bene placitum,* to be revoked at the pleasure of the sovereign and it is very evident that it was a mere gratuity. The corporation was required to do absolutely nothing, the favor was bestowed upon it by the State to enable it to repair its buildings and to get upon its feet, and there was no consideration moving to the State that could uphold a promise not to alter, amend or repeal the act. It is as naked a case of a mere gratuity as is to be found in the books.

Tucker vs. Ferguson, 22 Wallace, 527, is cited in the majority opinion of the Court below.

The facts in this case are somewhat complicated. Congress granted to the State of Michigan, certain alternate sections of public lands to aid the State in the construction of railroads. This act was passed June 3d, 1856. The Flint & Marquet Railroad was organized in 1857 under the General Railroad Act of Michigan of 1855. Congress permitted the State to grant these lands to railroads upon certain designated routes. The State accepted the grants and gave to the Railroad Company certain of the lands to be used for the purposes of the road and provided that no tax was to be imposed on the lands of the company for seven years, except such lands as should have been sold, provided for certain specific taxes and then declared, in regard to the several taxes, that they "shall be in lieu of all further taxes to be imposed in this State."

Subsequent acts were passed and in 1871 an act was passed in relation to the lands granted to the railroad, which stated, "that no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, 1871, and until after three years after the dates of the certificates showing that such lands had been earned by said Railroad Company." The Constitution of the State at all these times contained the usual provision as appears in the New York Constitution. "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed."

The Court held that the State had complied with its agreement to forbear to tax for seven years, that the provision of the Act of 1871, exempting the lands specified from local taxes and for three years from the first of April, 1871, was *nudum pactum*. The railroad was already constructed. It already held title to the lands. It did nothing and was required to do nothing in exchange for the privilege and the Court said, citing the Christ Church case,

> "there was no consideration. The company was required to do nothing and did nothing in return. As between individuals the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State and the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity, spontaneously made, which might be kept, changed or recalled at pleasure."

Pennsylvania Railroad Company vs. Miller, 132 U. S., 75.

In this case the Charter of the Pennsylvania Railroad Company under the Pennsylvania Acts of 1846 and 1847, provided that it might construct a railroad from Harrisburg to Pittsburg, might take lands and necessary materials for the purpose, "provided such compensation shall be made, secured or tendered to the owner or owners of any such lands or materials as shall be agreed upon between the parties or in such manner as is hereafter mentioned."

The Seventeenth Section of the Act authorized the railroad to make such elevated railroads, extensions and branches as by the president and directors of the company might be deemed advantageous. By the Pennsylvania Constitution of 1873, it was provided that cor-

porations invested with the privilege of taking private property for public use, "shall make just compensation for property taken, injured or destroyed by the construction or enlargement, etc., etc." In 1880 and 1881 the Pennsylvania Company extended its road and built an elevated railroad, doing damage to the adjoining property of the plaintiff, for which action was brought.

The court held, and very properly, that as to this extension the Company acted under the existing laws, that the contention that there was a contract with the Company, that it might make, under its original charter, all kinds of extensions subject to the only liability spoken of in the charter, was unsound. As was said by Justice Blatchford,

> "But the defendant took its original charter subject to the general law of the state and to such changes as might be made in such general law and subject to future constitutional provisions or future general legislation. Since there was no prior contract with the defendant, exempting it from liability to such future general legislation in respect to the subject matter involved. * * * The provision contained in the constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the state."

And the court further in its opinion likened the case to the one which exists under the statute, imposing a liability to damages for the negligent killing of any person, which law was not in existence when a vast number of railroads were incorporated, but no one ever doubted the authority of the Legislature to pass such a law, although it did impose an additional liability.

> *New Orleans C. & L. R. R. Co. vs. City of New Orleans, 143 U. S. 192.*

This was an action in favor of the City to collect license tax from the Railroad Company imposed by an ordinance of the city pursuant to a statute, which provided that the business of carrying on the street railroad, the annual license, based on the annual gross receipts, shall be as follows: "When the said annual gross receipts are $500,000 or in excess of that amount, the license shall be $2,500." It appeared that in October, 1879, the city of New Orleans sold to the New

Orleans City Railroad for the price of $630,000, the right of way and franchises for running certain lines of street railroad until January 1st, 1906.

The Company agreed to construct its railroad, keep the streets in repair and comply with regulations etc. and to "annually pay into the City Treasury upon the assessed value of said road and fixtures the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment." The railroad was afterwards sold to the plaintiff in error. The court, in a very short opinion, held that there was nothing in the terms of sale of the railroad that prohibited the city from imposing a license fee in the future. Nor could such an agreement be spelled out of the contract of sale. The Company simply agreed to do what all others did, pay its taxes, and there was no agreement, expressed or implied, that the city should not in the future impose further conditions, not repugnant to the terms of the grant itself. The doctrine is the same as that enunciated in this Court in the franchise tax cases, which have been referred to.

Memphis Gas Light Co. vs. Shelby County, 109 U. S. 398, was a case of the same nature. The Company claimed to be exempt from the imposition of a license tax. The charter of the Company, which it was claimed contained an exemption from the imposition of any further taxes, was section 5 as follows:

> "Said Company shall have the privilege of erecting * * * gas-works and manufacturing * * * in the city of Nashville * * * for a term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged * * * provided said company shall never charge more than one cent for every cubic foot of gas used * * * nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas."

The only argument the counsel for the Company used was that the agreement fixed the price of gas, and therefore an agreement was implied that no license fees or taxes should be imposed, as it would permit the State to destroy the privilege granted. The power of the State to destroy property by the imposition of taxes, provided there

is no contract prohibiting their imposition, was declared to exist by Justice Marshall almost at the beginning of the government and has never been questioned since.

These are the leading cases in this Court dealing with alleged contracts directly between the Legislature and an individual corporation. That there is a wide distinction between such contracts and alleged contracts, under a general law of the State prescribing as to a particular class of corporations or individuals, certain immunities of which general law, corporations or individuals avail themselves, is well settled under the authorities.

In the outset we wish to call the Court's attention to the case of *State Bank vs. Knoop, 16 Howard, 369.*

This case arose under the General Act of the Legislature of the State of Ohio, providing for the incorporation of banks. The Sixtieth Section of the Act provided that each banking company, incorporated under the act, should semi-annually set off to the State six per cent, on the profits, deducting therefrom the expenses and ascertained loss for the six months preceding. "Which sum or amount so set off shall be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject." By a subsequent act, the Legislature imposed further taxes, the right to collect which was challenged by the plaintiff, incorporated under the act in question.

The Supreme Court, speaking through Justice McLean, held that the effect of the act was to constitute an inviolable contract with each corporation which accepted the provisions of the act and expended its money upon the faith thereof. The Court held that the effect of the act was to create a separate contract between the State of Ohio and each bank organizing under the act and accepting its provisions.

East Saginaw Salt Mfg. Co. vs. City of East Saginaw, 13 Wallace, 373.

This was a case where the plaintiff in error was incorporated under a general law of the State of Michigan, which provided for the incorporation of companies to bore for and manufacture salt, and applied to any and all individuals engaged or to be engaged in such manufacture, provided that all should be entitled to the benefit of the provisions of this act. Section2 provided, "All property, real and personal, used for the purpose mentioned in the first section of this act shall be

exempt from taxation for any purpose." Section 3 provided for a bounty of ten cents for each and every bushel of salt manufactured by any individual or corporation, provided that such individual or corporation manufactured at least 5,000 bushels as specified above, and the bill set out that the plaintiff had become incorporated under and by virtue of the provisions of the act and had expended large sums of money, in reliance upon its provisions. This Court, speaking through Mr. Justice Bradley, conceded the power of the State to exempt property from taxation, either for a limited time or perpetually, and held that in this case no contract was made, that the offer of the Legislature was a mere gratuity made in pursuance of an economic policy to encourage the manufacture of a certain article, and that it was not bound to continue it indefinitely. Mr. Justice Bradley draws the clear distinction for which we here contend, between the case at bar and the case under consideration, in the following language:

> "Had the plaintiff in error been incorporated by a special charter and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all corporations and individuals,* who shall manufacture salt in Michigan * * * shall be exempt from taxation as to all property used for that purpose * * * ." Again, "As the Supreme Court of Michigan says, it is a bounty law and nothing more. A law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal."

The opinion then goes on to state that no one is obliged to accept the provisions of the act; no one is obliged to continue in the manufacture of salt for any length of time; no one accepting the provisions is bound to continue for a day. Neither was the State bound to continue this general offer for any particular length of time. Again the Court says,

> "Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State and

> corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the Legislature are binding on both parties."

Then the Court proceeds to distinguish the Ohio case as follows:

> "And so corporations formed under general laws in place of special charters, like the Ohio banks, under the General Banking Law of that State, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters."

The Court then called attention to the language of Justice McLean in *Bank vs. Knoop,* as follows: "The act is as special to each bank as if no other institution were incorporated under it."

The court then, in the principal case, continues,

> "In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that during the existence of any corporation formed under the act, the stiplation or exemption specified in it is to operate. The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations and to all corporations having power to manufacture salt."

It is very clear that the decision was placed upon the express ground, that the offer contained in the statute was simply one dictated by the policy prevailing at the time the offer was made, and could not be construed into a contract with every separate individual or corporation who might avail themselves of its provisions.

Stanislaus vs. S. J. & K. R. C. & T. Co. 192 U. S., 201.

This case is entirely analogous to the last one cited. Defendant in error was incorporated under a general act of the Legislature of the state of California. That act provided that every company organized sh[illegible]ld have power to establish, collect and receive rates, water rents or tolls, which shall be subject to regulation by the Board of Supervisors of the County in which the work is situated and continues, "but which shall not be reduced by the supervisors so low as to yield the stockhold-

ers less than one and one-half per cent. per month on the capital actually invested." The Company was incorporated in 1871 and in 1885 the Legislature passed an act permitting the Board of Supervisors to fix the rates not less than six nor more than eighteen per cent, upon certain valuations, it being in direct hostility to the provisions of section 3. The defendant in error invoked the federal constitution. Mr. Justice Peckham, in delivering the opinion of this court, uses this language:

> "No special charter was given the company, directly from the Legislature, otherwise than is contained in the powers granted by the two acts above named."

Further on the opinion continues.

> "The authority given by the act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the act that the Legislature would not itself subsequently alter that authority. The state simply authorized its agents, the Boards of Supervisors, to regulate rates but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied, that the state might not thereafter authorize the Boards to reduce them, or that it might not itself do so directly. Even as between individuals such an implication would not be a reasonable one from the language used. * * * This portion of the act applies to the boards and limits their right of reduction, leaving unhampered the right of the state to interfere directly or by authorizing the boards to reduce the rates below the point stated in the act."

At page 211, the opinion puts the decision upon grounds which cannot be challenged and states that assuming that there was a contract, the rates could be changed under the provision of the constitution of 1849, which is an exact copy of the New York constitution in regard to the reserved right to alter, amend or repeal the charters of corporations formed under general statutes, and the court holds, that the alteration made by the subsequent act was a reasonable alteration under the circumstances.

But the case of *W. & M. Railway Co. vs. Powers, 191 U. S., 379*, exactly defines and limits the doctrine. In that case it appeared that in 1893 the Legislature of the State of Michigan passed an act which provided, "that the rate of taxation fixed by this act

or any other law of this State, shall not apply to any railway company hereafter building and operating a line of railroad within this State north of parallel 44 of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile."

Under this act the M. & N. Railroad Company was incorporated and then conveyed all its property, rights and franchises to the plaintiff, a Wisconsin corporation, which thereupon constructed the road. It is north of parallel 44 and its gross earnings never equaled $4,000 per mile. In 1897 the state amended the act of 1893 and levied a specific tax upon the business of every railroad corporation. The federal constitution was invoked by the plaintiff in error. The court states, at page 385, speaking through Mr. Justice Holmes,

> "The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms.
>
> The question is pretty well answered by a series of decisions in this Court. A distinction between an exemption from taxation contained in *a special charter* and general encouragement to all persons to engage in a certain class of enterprise is pointed out in *E. S. S. M. Co. vs. East Saginaw, 13 Wallace 373.* In earlier and later cases it was mentioned that there was no counter obligation, service or detriment incurred that properly could be regarded as a consideration for the supposed contract. (Citing cases.) But whatever the ground, thus far attempts like the present, to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties, have failed."

Justice Holmes then proceeds,

> "In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements, each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive, each for the other in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this provision in a general tax law, as we should deal with an alleged

simple contract, while, no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, (citing cases) it is clear that we would require an adequate expression of an actual intent on the part of the State to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change."

In the following language Mr. Justice Holmes states the true ground for the decision of all these cases and draws in a masterly way the distinction between a general offer by a State to all persons choosing to avail themselves of it, pursuant to an economic policy, and contracts entered into with an individual corporation:

"But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the Legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of, a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend or repeal charters, etc., contained in the Constitution of Michigan (citing cases) or a similar power in the General Railroad Law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts."

M. G. L. Co. vs. Tax D. of Tenn., 143 U. S., 398.

This case presents exactly the same question under the same charter but under a later law, as was presented in *Memphis Gas Light Company vs. Taxing District of Shelby County, 109 U. S., 398.* The Court followed the same reasoning as in the previous case.

The Railroad Commission cases referred to in the prevailing opin-

ion of the Court below, one entitled *Stone vs. Farmers' L. & T. Co 116 U. S., 307*, were actions brought by the trustee of certain bondholders, secured by a mortgage issued by the Mobile & Ohio R. R. Co., to restrain the carrying into effect of an Act of the State of Mississippi, passed March 11th, 1884, providing for the creation of a commission to supervise freight and passenger rates on railroads. The Railroad Company was incorporated in 1848 by special Acts of the Legislatures of Alabama, Mississippi, Tennessee and Kentucky. The provisions in its charter which the subsequent legislation of Mississippi was claimed to infringe, were Sections 1, 7 and 12, which were contained in the charter from each State. The first authorized the company to transport, take and carry property and persons by power and force of steam, etc. Section Seven,

> "that the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effect of said company * * * " Section 12, "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

By this charter it was claimed that the sole right to manage its own affairs and fix the charges for transportation of persons and property resided in the company and in the company alone. The opinion of the Court enunciated the doctrine that the matter of rates, when not absolutely fixed by the charter without the power of alteration, were subject to the supervision of the State and the charges might be regulated to a reasonable extent, a doctrine which has since been followed by this Court in many cases.

The doctrine to be gathered from all of the above cited cases seems very clearly to be this.

That in the absence of the reserved power to alter, amend or repeal, a special charter or franchise granted to a particular corporation, imposing duties and containing privileges or immunities in regard to a particular thing, when accepted by the corporation, either in writing, if so required by the act or franchise, or accepted by acting

upon the charter or franchise and performing the duties imposed, becomes an inviolable contract and cannot be impaired by the Legislature.

The same is true where under a general act, such as was considered in the Knoop case, a charter is given to all persons choosing to become incorporated under it, and the general act contains privileges and immunities offered to the corporations taking advantage of the act. The mere acceptance of the provisions of the act by any corporation by becoming incorporated under it, constitutes a contract, but where a general statute can be properly construed as a taxation policy statute merely, the State cannot be held to be addressing any corporation or individual by such statute in the sense of making an offer to them which, if accepted and acted upon, will constitute a contract. The true construction of such statutes is to hold them expressions of taxation policy, subject to repeal at any time at the pleasure of the State. Any corporation or individual acting upon the faith of such a statute, does so with full knowledge that the State may at any time change its policy and repeal the statute.

None of these cases, as before shown, touch the question at issue in the case at bar for the reason that here was a franchise granted or one confirmed to a particular corporation, containing a specific exemption and the corporation accepted the provisions of the act by acting upon it and extending its road under it and expending large sums of money upon the faith of the State's promise. This constitutes a perfect consideration as between individuals and it constitutes a perfect consideration as between the state and an individual, as has been said innumerable times in this Court.

It is respectfully urged that the doctrine of these cases answers the suggestion made by Chief Judge Cullen in his opinion reported 182 N. Y., 117.

> "Had, in 1869, instead of the special statute, a general law been passed, exempting railroad companies from contribution towards the cost of repaving the streets, it is clear that such law might have been thereafter repealed and there might be imposed on the company a reasonable and proper tax for the improvement. (Citing Miller case.) Now how does it differ, that instead of a general statute a special law was enacted? In my opinion it only goes to the intent of the Legislature. If I am right in the position that the Legislature could have enacted

the statute of 1869, so far as its provisions are under examination here, without any assent from the Railroad Company, then had the act concluded, 'this statute is passed in the exercise of the powers of taxation and police and not as a grant,' it could not well be contended that the Railroad Company acquired thereby any contract or property right.

"I imagine that a continuous power vested in the Legislature may be exercised and its exercise recalled or modified as well by special legislation as by general legislation, if no provision of the state constitution forbids, which was the case in 1869. If to-day a statute were passed, repealing Section 98 of the present General Railroad Law and enacting that street railroad companies shall not be compelled to pay any portion of the expense of paving the streets within their tracks, will it be denied that subsequently the Legislature might change that policy and impose on the Company the burden of which it had previously relieved them? If this be so, why equally may not the Legislature relieve to-day a particular Railroad Company from that burden and next year reimpose the burden upon it?"

We say to this contention, that the doctrine laid down in the cases cited gives the full and perfect answer to it. Assuming the absence in the Constitution and Railroad Law of any provision to alter, amend or repeal, if the general act were passed repealing Section 98 of the Railroad Law, then within the meaning of the cases cited the Legislature might re-enact it years from now, because there is no contract with the several corporations acting under it.

But we do say that at the time the act of 1869 was passed, there was no general law requiring any street railroad to pave between its tracks or even to repair the pavement between its tracks. This duty was one imposed by special charters or by municipalities acting under powers conferred by the Legislature and the court of appeals always had said that where a franchise was granted to a specific corporation by a city, imposing conditions which were authorized by the Legislature, that it constituted a contract and no one disputes to this day that such is the law. The Act of 1869 imposed duties and regulated the extent of the company's duties in regard to pavements.

The Legislature directly did what it might have required or empowered the municipality to do, and the particular company named in the act accepted the provisions of the act and expended its money in complying with the conditions imposed upon it, and now it is urged

that the Legislature can strike out the consideration for the imposition of onerous duties upon the Railroad Company and continue in force the duties themselves.

II.

NEITHER THE RESERVATION CONTAINED IN THE CONSTITUTION OF THE STATE, NOR THAT CONTAINED IN THE REVISED STATUTES, NOR THAT CONTAINED IN THE ACT OF 1850, AUTHORIZES OR JUSTIFIES THE IMPOSITION BY THE RAILROAD ACT OF THE LIABILITY IN QUESTION UPON THE PROPERTY OF THE DEFENDANT.

(*a*) The reservation contained in the Constitution reads as follows:

> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of corporations cannot be attained under general law."
>
> "All *general* laws and *special* acts passed pursuant to this section may be altered from time to time, or repealed."
>
> *Constitution, Art. VIII., Sec. 1*

It is plain that this reservation refers only to laws authorizing the formation of corporations or to special acts creating corporations, since by express terms it is limited to general laws or special acts passed pursuant to the section in which the reservation occurs.

Now the exemption of the Rochester City & Brighton Railway Company from liability for a permanent improvement was not given by the general law, namely, the act of 1850, under which it was formed, nor does the legislation n question alter or repeal or in any way affect any provision of that act. The charter of incorporation of the Rochester City & Brighton Railway Company being left entirely unaffected by the legislation in question, it is clear beyond all necessity for argument, that the legislation cannot be justified in any sense by the reservation which only applies to alterations or repeals of charters.

As already shown the exemption from assessment for the expense of a permanent improvement of the streets, rests in the contract with the municipality of the city of Rochester confirmed by the Act of 1869. Neither that contract nor the Act of 1869, is a *general* law or a *special* act *passed pursuant to Article VIII. of the Constitution,* which are the only enactments which are made by the reservation in that article subject to alteration or repeal.

So far, therefore, as the contention is made that the legislation in question was authorized by the reservation in the Constitution it is plainly untenable.

(*b*) The Reservation contained in the Revised Statutes has no application to the legislation under consideration. This reservation is as follows:

> "The *charter* of every corporation that shall be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature."
>
> *Revised Statutes of New York, 7th Ed. Chap. 18, Title 3 Sec. 8.*

The act, chap. 34 of the laws of 1869, was not an amendment in any sense to the charter of the R. C. & B. R. R. Co. and the general railroad acts do not alter, amend or repeal the Charter of the Rochester City & Brighton Railroad Company. The Charter is left in full force and effect and all the powers possessed by that corporation under its charter have passed to the plaintiff in error unaltered, unamended and unrepealed in any particular.

The general railroad acts do not assume in any degree to deal with the Charter of the Rochester City & Brighton Railroad Company. All that those acts do is to impose a specific liability for a designated permanent improvement upon property of the plaintiff in error. The rights that the general railroad acts affect are not, as we have seen, chartered rights, but contract rights.

(*c*) The reservation of the Act of 1850 relied upon as authorizing the legislation in question reads as follows:

> "The Legislature may at any time *annul* or *dissolve* any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against any corpora-

tion, its stockholders, or officers for any liability which shall have been previously incurred."

Laws of New York for 1850, Chapter 140, Section 48.

There is not a suggestion in either of the general railroad acts of an annullment or dissolution of any corporation, so it is plain, beyond all question, that the reservation in the Act of 1850 is without force or authority as justifying those acts.

The reasoning under this point and the authorities cited, apply with equal force to the General Railroad Act of 1884 and the revisions of 1890 and 1892. If it be conceded that the New York Court of Appeals has decided in the *Conway Case* that those acts, or some of them, operated to repeal chapter 34 of the Laws of 1869, the power to repeal was not contained either in the Constitution, the Revised Statutes or the General Railroad Act of 1850. It is, therefore, immaterial, so far as this discussion is concerned, whether the contention of the defendant in error is that the alleged repeal was effected by those acts.

(*d*) It is the settled doctrine of the New York State courts and of this Court that the sole effect of a reservation of the right to repeal a charter and of the reservation of the right to alter and amend is limited in the first case to a destruction of the corporate life, and in the second case to the *regulation* and *control* of the affairs of the corporation freed from the restrictions of the Federal Constitution, and that in neither case does it extend to the destruction or impairment of the contracts of corporations or to rights acquired thereunder.

People v. O'Brien, 111 N. Y., 1–44, and cases cited.

In the case cited, the N. Y. court of appeals, speaking through Ruger, Ch. J. says:

"The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life and disable it from continuing its corporate business (*People ex rel Kimball v. B. & A. R. R. Co. 70 N. Y. 569; Phillips v. Wickham, 1 Paige, 590*), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by

the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn v. Illinois, 94 U S. 113, 123.*)

"We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher vs. Peck* (*6 Cranch, 87, 135*): 'If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyences have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.'

"In speaking of the exercise of this power by Congress in the Sinking Fund Cases, Chief Justice Waite says: 'Congress not only retains, but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits reduced to possession of contracts lawfully made.

"In *Commonwealth vs. Essex County* (*13 Gray, 239*) Justice Shaw said: 'When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' (*Albany R. R. Co. vs. Brownell, 24 N. Y. 345.*) * * *

"*Greenwood vs. Freight Company* (*105 U. S. 13*), was an action by a stockholder in the Marginal Company against the freight company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was, therefore, allowed to bring his suit to protect his interest in its property. Judge Miller says in that case: 'Personal and real property acquired by the corporation during its lawful existence, *rights of contract, or choses in action so acquired,* and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such repeal, and the court may, if the legislature does not provide some special remedy, enforce such rights by the means in its power. The rights of the shareholders of such a cor-

> poration to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.' It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the provisions requiring compensation to be made therefor, under the power of eminent domain."

In his dissenting opinion, in the case at bar, Judge Gray said: (Record pages 104, 105) and we quote his words as a part of our argument upon this proposition.

> "There was no reservation of any right to alter the conditions, or to repeal the grant of an exemption, and no such right existed under the Constitution, or in the statutes of the state; for whatever reservation of powers was contained therein related to the alteration, or repeal, of general laws, or of special acts, passed for the formation of corporations; to the alteration and repeal of charters; or to the annulment and dissolution of corporations. (Constitution, art. VIII, sec. 1; R. S. chap. 18, title 3, sec. 8; chap. 140, Laws of 1850, sec. 48.) Such reservations of power did not touch the case of a contract right, which had become property. (*People vs. O'Brien, 111 N. Y. 1, 44; Albany Northern R. R. Co. vs. Brownell, 24 ib. 345.*) This contract, therefore, was not subject to recall, or to modification. The covenant was implied on the part of the government not to invade the rights vested and on the part of the grantee to execute the duties and conditions prescribed in the grant. The government could not do any act to impair the grant without breach of the contract. (*3 Kent, 458; Dartmouth College Case, 4 Wheat. 519; People vs. Sturtevant, 9 N. Y. 273.*) The city and the railroad company regarded this legislation as constituting a contract, inviolable in its provisions, and gave practical construction to it from 1869 to 1897."

Applying the principles of these cases to the case at bar, and it is clear that under neither of the reservations relied upon could the legislature by legislation, which was not intended and which does not purport to be either an amendment, alteration, repeal, suspension or dissolution of the *charter* of the Rochester City and Brighton Railroad Company, deprive it of its property, represented by its contract rights with the municipality of the city of Rochester, and impose up-

on it the expenses of the permanent improvement of the streets as is attempted to be done by the railroad acts.

Certainly the Legislature was powerless to do this if any regard or weight is to be given to well-considered cases in this Court.

In the case of *New Jersey vs. Yard, 95 U. S. 104*, the facts were as follows: By an act of the Legislature of the State of New Jersey passed in 1865, it was provided in substance as follows:

> "That the tax of one-half of one per cent provided by the original incorporation of the Morris & Essex Railroad Company, to be paid by that company to the State whenever the net earnings of the company amounted to 7 per cent upon the cost of the road, shall be paid at the expiration of the first year from the time when the road of the company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State or any law thereof; provided that this section shall not go into effect or be binding upon the company until the company, by an instrument under its corporate seal, filed in the office of the Secretary of State, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act;"

This act contained no reservation of a right to alter, amend or repeal. The company signified its assent as provided by the act. By the subsequent Act of 1873 a more burdensome tax was imposed upon all railroad companies not protected by irrepealable contracts, and the Court of Error of New Jersey held that the Act of 1873 was applicable to the Morris & Essex Railroad Company because the contract of 1865 was repealable by the Legislature of the State, under the clause in the original charter of the corporation in 1835, by which the Legislature reserved "the right to alter, amend or repeal this Act, whenever they thought proper."

This reservation was repeated in a subsequent amendment to the charter, but was not repeated in the Act of 1865. Upon the Writ of Error to this Court it was held that the Act of 1865 and its acceptance by the railroad company constituted a contract which it was beyond the power of the Legislature to repeal without the consent of the railroad corporation. That the reservation of the right to amend, alter or repeal contained in the original charter of the company had no application whatever to the amendment of 1865,

and that it was not the intention of either the State or the railroad company that the contract created by the acceptance of the provisions of the Act of 1865, should fall within the reserved power to alter, amend, or repeal.

Upon this point the Court said:

> "Can it be believed that it was intended by either party to this contract, that after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of a contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the Legislature to alter or amend it at pleasure? If the State intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?"
>
> "The language used by the Legislature is inconsistent with the right claimed.
>
> "Which tax (one-half of one per cent) shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof. Is there here to be implied 'except such laws as may hereafter be enacted?' Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or, how can it be said to be in satisfaction of all taxes whatsoever under authority of the State, if the State could immediately impose another and more burdensome tax?
>
> "We admit the force of the doctrine, that, when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear and cannot be made out by dubious implications.
>
> "But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough and taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States. The implication is of a right to revoke it and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose."

The case at bar is quite as strong in its facts as the case cited.

See also *Bank v. Knoop, 16 Wallace (U. S.) 380.*

In a somewhat recent case in this Court of *Stearns vs. Minnesota, 179 U. S., 223*, the question of limitations upon the reserve power to alter, amend or repeal charters as affecting the rights to repeal statutes limiting even the general power of taxation was considered. The case is quite complicated in its facts, which, briefly stated, were as follows:

A statute of Minnesota exempted a certain railroad company from all taxation on lands granted to it for the purpose of the construction of its road, upon payment of a percentage annually of the gross earnings of the railroad, which percentage it was declared should be in full of all taxation and assessment whatever. While this statute was in force the Constitution of Minnesota was amended so as to require, that any law providing for the repeal or amendment of any law, containing an exemption of a railroad corporation from taxation upon its property or real estate, upon payment of a percentage of its gross receipts, should, before it takes effect, be submitted to a vote of the people of the State and be adopted and ratified by a majority of the electors of the State, voting at the election at which the same shall be submitted to them.

Subsequently, in 1895, the Legislature of Minnesota repealed the exempting acts so far as they exempted real estate from taxation, other than that which was used n the actual operation of the railroad. This act of 1895 was under the provision of the Constitution submitted to a vote of the people of the State and ratified by a majority of the electors thereof. It was contended that the original exemption from taxation was a contract, and that the Legislature was without authority to impair its obligation. On behalf of the State it was contended, that the reserve power to repeal exemptions from taxation upon submitting the act effecting such repeal to a vote of the electors, and obtaining its ratification by them, justified and authorized the repealing legislation, and destroyed the previously existing exemptions, as soon as the Act of 1895 repealing that exemption was ratified by the people, under the provisions of the Constitution of Minnesota.

The majority of the court were of the opinion that the exempting act constituted a contract between the railroads and the State which it could not impair. That while that contract when originally made was void, because of a provision in the Constitution of Minnesota that all taxes levied in the State, should be levied upon a cash value

tion of the property taxed, yet the amendment of the Constitution of Minnesota providing for the repeal of such exempting legislation ratified the contract and made it valid. Upon this point the court said:

> "The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies, except upon a vote of the people. The converse of that proposition may be said to be, that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment? The Law of 1895, adopted by the people, does not release the railroad companies from the burden of paying 3 per cent of their gross earnings into the State treasury, but simply operates to put certain properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? * * * *
>
> "So it may well be said in the case before us, that a contractural exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the company either in whole or in part, the exemption conferred by the contract."

So, too, in the case at bar it was not competent for the Legislature, by the general railroad acts, to repeal the contract of 1869, or the exemption of 1869 as respects a particular pavement and particular streets, and still leave that contract in force, as it has done, as respects all other streets in the City of Rochester, with the obligation upon the railroad company to make general repairs. The entire obligation of the contract is to-day still in force. Indeed, at the very time the pavements were laid, the expense of which, by the acts in question, is sought to be charged upon the Rochester Railway Company, that corporation was performing to the full its obligation of making general repairs of the street and carrying passengers at the reduced fare and so paying to the City of Rochester the consideration for its exemption from bearing any portion of the expense of a permanent improvement of the street.

What the railroad acts do is to repeal the contract of exemption, leaving still in full force the obligation of the contract on the part of the railroad corporation to make, as respects these very improvements and streets, general repairs and carry passengers at the re-

duced rate of fare provided by the amended ordinance of 1869 or the act of 1869. In other words, precisely what was done in the case of *Stearns vs. Minnesota* (*supra*), and condemned by this Court in that case, has been done and is now being done under the provisions of the acts. It was thought worthy of note in the *Stearns case* to state that the contract in that case had been acquiesced in for thirty years. Upon this point Mr. Justice Brewer remarks:

> "As a preliminary matter, it is worthy of note that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. * * * Both the railroads and the State accepted and acted under it for nearly one-third of a century."

The same is true in the case at bar. The act of 1869 exempting the Rochester and Brighton Railway Company from liability for a permanent improvement, has been acquiesced in both by the State and the City of Rochester up to 1897, a period of nearly thirty years.

In the same case Mr. Justice White, with whom concurred Justices Harlan, Gray and McKenna, said:

> "My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owned by the State to the other contracting party, is not to repeal, alter or amend the contract at all, but whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax, was the duty on the part of the State to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus independent, are of necessity indivisible, and to retain the entire duty and right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. Under these circumstances, to enforce the amendatory act would necessarily be to deny the corporation the equal protection of the laws since it would leave the corporation subject to taxation, not by the general laws of the State, but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract."

In the case of *Duluth & Iron Range Railway Company vs. County of St. Louis, 179 U. S. 392,* it was said of the legislation, after referring to the *Stearns case*

> "Here, as there, to treat the act in question as a repeal, alteration or amendment of the contract, would be to preserve all the obligations of the corporation in favor of the State, and take away from the corporation the consideration on the part of the State, upon which the duty of the corporation to pay the gross receipt tax rests."

So, too, in the case at bar, to consider the railroad acts as a repeal, alteration or amendment of the act of 1869, as respects the exemption from bearing the expense of permanent improvement, is to take away from the defendant the consideration upon which it accepted the obligation to make general repairs, and to carry certain passengers at a reduced rate of fare, and at the same time continue the obligation to make such general repairs. As before stated, the Act of 1890 is not an alteration, amendment or repeal of the Act of 1869, but is simply a violation of the contract and obligation existing between the city of Rochester and the defendant which was confirmed by the Act of 1869.

In the case hereinbefore cited, and lately determined in this Court, *Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543,* the original company was incorporated in Michigan in 1834, by an Act of the Legislature of Michigan, February 13th, 1855. The Detroit & Pontiac Railroad was authorized to change its name to the Detroit & Milwaukee Railway Company and to purchase all the rights, property and franchises of the Oakland & Ottawa Railroad Company, which had been incorporated under an Act of the Legislature, April 3rd, 1848. Section 9 of the Act of 1855 exempted the corporation from all taxes, excepting one per cent. upon its capital stock. In 1850, the Constitution of Michigan contained the clause which is identical with Section I of Article VIII of the Constitution of the State of New York.

This Court held that the State had not, in its Constitution, reserved the right to alter, amend or repeal the statute granting the exemption.

Upon the argument in the courts below and in the brief of counsel for defendant in error in the courts below great reliance was placed upon the authority of the cases of *Hoge v. Railway Co.* (*99 U. S.*

348), and *Sioux City R. Co. v. Sioux City* (*138 U. S. 898*), as establishing that under a reservation of a right to alter, amend and repeal, it is competent to repeal the exemption from bearing the expense of permanent improvements. A brief examination of those cases will disclose that they are in no sense entitled to the weight given them by counsel.

In the case of *Hoge v. Railway Co.* (*supra*), the reservation relied upon as authorizing the legislation attacked in that case was contained in a statute passed in 1841, and was in the following terms:

> "That it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment or modification thereof, unless the act granting such charter, renewal, amendment or modification, shall in express terms except it, that every charter of incorporation granted, renewed or modified as aforesaid shall at all times remain subject to amendment, alteration or repeal by the legislative authority."

Under this broad reservation the court held that an act incorporating a railroad company in 1856, containing no clause excepting its charter from the provisions of the Law of 1841, *supra*, was subject to the provisions of that act, and its charter liable to alteration, amendment and repeal.

In the case of *Sioux City R. Co. v. Sioux City* (*supra*), the reservation relied upon as authorizing the increased burden was section 1090 of the Code of Iowa, which reads as follows:

> "The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Under this broad reservation it was held that a resolution of the City Council of Sioux City requiring the company to pave between its tracks, did not prevent the Legislature from placing upon the railroad

company the additional burden of paving one foot outside of its tracks. It was rightly so held too, because of the provision in the reservation which subjected all corporations to the imposition of such conditions upon the enjoyment of their privileges as the general assembly shall deem necessary for the public good.

No such reservation or power exists in the case at bar, as was the subject of consideration in the case of *Hoge v. Railway Co.* (*supra*), or of *Sioux City . Co. v. Sioux City* (*supra*). The defendant in this case relies upon a resolution of the Common Council which, confirmed by the Legislature, under the decisions of the State of New York, constitutes a contract, and which, under the decision of this Court in *Chicago v. Sheldon* (*supra*), and other cases, constitutes a contract; and also upon an act of the Legislature of the State of New York confirming that contract, namely, the Act of 1869, and also upon the long acquiescence of both the city of Rochester and the State in the binding obligation of that contract.

A very different question would arise if there existed in the case at bar the broad reservation contained in the *Sioux City* and the *Hoge Cases* (*supra*), of the right to alter, amend or repeal and impose further conditions, and if, in the case at bar, as in those cases, the State had itself never taken any action confirming the exemption.

It is confidently submitted therefore, that neither the *Hoge Case* nor the *Sioux Case* are authority in support of the legislation, contained in the railroad acts as construed by the Court of Appeals.

III.

THE COURT ERRED IN HOLDING THAT EVEN IF THE ACT OF 1869, TOGETHER WITH THE ORDINANCES OF 1862 AND 1869, CONSTITUTED A CONTRACT, IT WAS PERSONAL TO THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY, AND DID NOT PASS TO THE PLAINTIFF IN ERROR, UNDER THE LEASE, FOLLOWED BY THE MERGER, MADE PURSUANT TO THE PROVISIONS OF THE ACT OF THE LEGISLATURE OF THE STATE OF NEW YORK, CHAPTER 254 OF THE LAWS OF 1867 AND CHAPTER 503 OF THE LAWS OF 1879, THE LATTER ACT AMENDING THE ACT OF 1867.

The Court will observe, by the record, page 42, finding 15, that

the plaintiff in error was incorporated pursuant to the provisions of Chapter 252 of the Laws of the State of New York for the year 1884. Section 1 of that Act provided for the incorporation of street railroad companies, and Section 9 of the Act provided for keeping in permanent repair certain portions of the streets in which its tracks were laid, which Section has been quoted at length at page 11 of this brief. Section 18 of the Act contained this provision, which so far as is pertinent here, was as follows: "Nothing in this Act * * * shall interfere with or repeal or invalidate any rights heretofore acquired under the laws of this State, by any horse railroad company, or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road, in accordance with the terms and provisions of its charter * * *"

On the 25th day of February, 1890, the Rochester City & Brighton Railroad Company executed and delivered to the defendant, a lease of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, which lease was duly executed and approved by the stockholders of both companies, according to the Laws of the State of New York.

(Record, page 44, Finding 16).

That afterwards, and in the same year, the plaintiff in error acquired all of the capital stock of the Rochester City & Brighton R. R. Co., and duly filed its certificate pursuant to the provisions of the merger acts.

(Record, page 44, Finding 17).

The Court of Appeals of the State of New York had settled the doctrine, that a company organized under Chapter 252 of the Laws of 1884, leasing all the property, rights and franchises of another railroad company, organized under a prior Act, held the franchise of the lessee as lessor, and operated such franchise by virtue of the lease, and not by virtue of the powers conferred upon the lessor company by the provisions of that Act, excepting so far as it was made a railroad corporation.

Gilmore vs. City of Utica, 121 N. Y., 561.

Pending negotiations for the lease, the Rochester City & Brighton Railroad Company had applied to the Common Council of the City of Rochester for leave to change its motive power from horse to electricity.

(Record, page 41, Finding 12).

The Common Council granted such application upon certain conditions, and prescribed that the Rochester City & Brighton R. R. Co. should, by resolution, accept the grant from the Common Council, and execute and deliver a contract to abide by such resolution, and such contract was executed and delivered by the Rochester City & Brighton R. R. Co. to the City on the 25th day of February, 1890, and duly approved by the City Attorney.

(Record, page 41, Finding 12).

That contract is annexed to the answer.

(Record, page 19, Ex. B).

After prescribing certain conditions, upon which the change should be made, and prescribing for a five cent fare from any one point in the city to any other point, and for the payment of a certain percentage of the gross receipts, the resolutions adopted by the Common Council and recited in the contract, provided:

> "It is further resolved, that before this grant and consent shall become operative, the said Company shall deliver to and leave with said Committtee, a written agreement with the City, to accept, and in each and every thing and particular, comply with each and all the provisions contained in these resolutions * * * * and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city, not in conflict herewith, which have been at any time heretofore, or may at any time hereafter be passed relating to the rate of speed, the manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the *general repairs of the streets* within and for two feet outside and adjoining said Company's track or tracks * * * "

It will thus be seen that the City in this contract expressly adopted the construction of years standing, that the Railroad Company was to make *general repairs,* and not new pavements.

Thereafter the lease was executed and the merger effected and the plaintiff in error applied to and obtained from the Board of Railroad Commissioners of the State of New York, its consent to the change of motive power.

(Record, page 45, Finding 18).

This being the situation, it becomes necessary to examine the question which was determined against us by the majority opinion

delivered in the Court of Appeals, whether the exemption granted to the Rochester City & Brighton R. R. Co., by the Act of 1869, from making new pavements, passed, under the lease and the merger, to the plaintiff in error, as to those streets in which the Rochester City & Brighton R. R. Co. obtained its franchise and constructed its road prior to the passage of Chapter 252 of the Laws of 1884. The question as to whether that exemption applied to extensions made subsequent to the passage of the Act of 1884, having been expressly waived by the plaintiff in error in the contract entered into by it with the defendant in error, in the year 1901.

(Record, page 53, Finding 27).

(Second and third paragraphs of the agreement, page 55.)

The Court's attention is respectfully directed to the first of the merger acts, Chapter 254 of the Laws of the State of New York for the year 1867 and to Chapter 503 of the Laws of 1879 amending the Act of 1867. The Court will bear in mind that Chapter 254 of the Laws of 1867 was in force when the Act of 1869 was passed, and the legislation of 1869 was passed in view, presumably, of the existence of Chapter 254 of the Laws of 1867.

The Amendment of 1879 did not alter to any extent the provisions of the original act. The act as it originally stood provided then, as now, that where a railroad was held under a lease it might take the transfer of the capital stock of the stockholders, or any of them, in the corporation whose road was held under lease and in addition exchange its own capital stock, and when the greater part of the capital stock had been so surrendered the directors of the corporation taking the transfer should become exofficio the directors of the lessor and then continued as now,

> "and whenever the whole of the said capital stock shall have been so surrendered or transferred and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation, to whom such surrender or transfer shall have been made, the *estate, property, rights, privileges, and franchises* of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely and without change or diminution, as the same were before held and enjoyed and be managed and controlled by the board of directors

of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation."

The act then provides for the protection of existing creditors.

The Court's attention is called to the sweeping language of this act. It not only vests the property and franchises but the rights and privileges as distinct from property and franchises.

Prior to the passage of the Act of 1867, one railroad corporation could not own the stock of another. Surely if all the stockholders of the R. C. & B. Railroad Company had transferred all of their capital stock to an individual or individuals, the owners of the capital stock would have held everything that the other stockholders possessed and in case of the winding up of the corporation, would have received all of its assets.

Now the Act of 1867 authorized a railroad corporation to hold all of the capital stock of another railroad corporation, and the statute provided what should be the result. The merging corporation was to hold everything the same as it had theretofore been held by the lessor company. Its directors were to become the directors of the lessor corporation and manage the corporation. There was no *sale* of the property contemplated, that passed as incident to the transfer of the stock and there was no consolidation of the two corporations.

The merging company, the plaintiff in error, took everything which the lessor had by the same title and to the same extent as any stockholder purchasing the entire stock would take it, only the merging company took title to all the property, privileges, etc., as well as to the stock. That *everything* was to pass to merging company was clearly the legislative intent. Each corporation continued in life, the lessor corporation, although it had parted with all its property, as well as the lessee corporation which acquired it. This proposition was distinctly held by the Supreme Court of the State of New York in the matter of *N. Y. E. Co., 43 State Reporter, 651*, unanimously affirmed in the Court of Appeals, 133 N. Y., 690.

This distinction must necessarily be borne in mind in examining the several cases referred to and relied on by the majority of the Court, below in arriving at the conclusion that the contract, if one

existed, was personal to R. C. & B. road and did not pass by the merger.

The several cases which it is desired to digest and bring to the attention of the Court are of three different kinds. *First,* where it was claimed that the exemption from taxation passed to another company under a foreclosure sale; *second,* where there was a consolidation of two corporations, one holding an exemption from taxation, into a new corporation, taking its life under existing law and it was claimed that the exemption passed to the new corporation; and *third,* where, as in the case at bar, there was a merger of one corporation holding an exemption from taxation into another existing corporation, authorized to merge it, and the claim made that the exemption from taxation contained in the charter or franchises of the company merged, passed to the merging company.

The leading case under the first subdivision of cases is *Morgan vs. Louisiana, 93 U. S., 217.*

In this case a railroad company was incorporated by a special act of the Legislature of Louisiana, passed in April, 1853, for the purpose of constructing a railroad from New Orleans to a certain point touching various point of importance.

The act provided that the capital stock of the company should be exempt from taxation and that the "works, fixtures, workshops ware-houses, vehicles of transportation and other appurtenances of the Company" should be exempt from taxation for ten years after the completion of the road, within the limits of the state, and that the president, engineer, clerks, agents and servants of the Company should be exempt from jury duty and military duty, except in case of invasion or insurrection. By subsequent acts, the company was authorized to borrow money and secure it by a mortgage on the *property and franchises of the Company,* no other words were used. The road was never completed, as provided in its charter. The mortgage was foreclosed and the property was sold under a decree granted in the foreclosure suit and executions issued upon certain judgments recovered by creditors of the Company, and the property was sold to an individual, not to any other corporation.

Nor does it appear that the individual proposed to incorporate another Company to comply with the provisions of the charter or to do ought except to tear up the rails and ties and sell them, sell

the locomotives and rolling stock to whoever would buy. The question was, whether under this foreclosure and judgment sale, under the descriptive words of "property and franchises," the privilege consisting of an immunity from taxation, passed to the purchaser. The court's reasoning in the forepart of the opinion is devoted to showing that the whole purpose of the act was to make the exemption personal to the road itself and argued that surely the president, engineers, clerks, agents and servants of the company could not well claim to be exempt from jury duty after the road went out of business. But the main contention of Justice Field was, that the language, "property and franchises" did not include the exemption from taxation. The mortgage was, therefore, not a lien upon the exemption and nothing passed under the sale.

In the opinion he said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to to the term 'franchises.' It is often used as synonomous with rights, privileges and immunities, though of a personal and temporary character, so that if any one of these exists it is loosely termed a 'franchise' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel * * they are positive rights or privileges without the possession of which the road of the Company could not be successfully worked.
>
> "Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction." Again, in conclusion the court says, "Immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation, as held in (citing cases). All that we now decide is that such immunity is not itself a franchise of a railroad corporation which passes as such, without other description, to a purchaser of its property."

And we say, following this decision, that the privilege of immunity from taxation, general or special, while it may be incapable of transfer without express statutory direction, we have under the merger act, express statutory direction that all the rights, privileges and franchises and property should pass. Immunity from taxation certainly is a privilege, even if not a part of the franchise.

L. & N. R. R. Co. vs. Palms, 109 U. S., 244.

In that case it is clear that under the act of the Legislature in the State of Florida, passed in 1881, certain taxes were imposed upon the railroad corporation, extending from the City of Pensacola, in the State of Florida, to the north boundary. The validity of the statute was questioned, as being repugnant to the federal constitution. It appears that a company was incorporated under the provisions of the general act of the State of Florida, passed in 1855. The eighteenth section of the act provided,

> "The capital stock of any Railroad Company accepting the provisions of this act, shall be forever exempt from taxation and the roads, their fixtures and appurtenances, including workshops, warehouses, vehicles and property of every description needed for the purpose of transporation of freight and passengers, or for repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction and for the period of thirty-five years from their completion."

Then follows provisions exempting servants and officers from jury or militia duty.

It appeared that the Alabama & Florida Railroad Company accepted the provisions of the act, although incorporated prior thereto and built a line of railroad, bringing it within the benefits and privileges of the act. It gave a mortgage and its rights, privileges and franchises were sold and conveyed to one, A. E. Maxwell, his heirs and assigns, in trust, and by him were sold and conveyed December 10th, 1872, to the Pensacola & Louisville Company, a corporation created by the laws of Florida. The last named company was reorganized by an amendatory act, which took effect February 4th, 1872, the 18th Section of which recited that it having become the assignee of the Alabama & Florida Company, and the franchises of that company, and being in possession of and operating

the said line of road, that it should have the same exemption from taxation that the said Alabama & Florida Railroad Company had.

The railroad franchise of this company was sold under a foreclosure to the Pensacola Railroad Company, which was organized by special act, February 27, 1877. It was provided in the act incorporating it and it was authorized to acquire by purchase and assignment, all the property, rights, franchises, privileges and immunities of the Pensacola & Louisville Railroad Company. It appeared that by the Thirteenth Section of the Act of 1872, amending the charter of the Pensacola & Louisville Railroad Company, that "it shall be lawful for said company to purchase, lease, acquire an interest in, to unite or consolidate with, lease or sell any other Railroad Company in or out of the State and to make the same one company."

Under these several provisions the Pensacola Railroad Company conveyed to the plaintiff the railroad in question, together with all its rights, privileges, easements and immunities. Upon this state of facts, this Court, speaking through Mr. Justice Mathews, held that the exemption from taxation, created by the Eighteenth Section of the Internal Improvement Act of 1855, under which the original company was incorporated, was a personal privilege, and was not assignable except by authority of some statute, following the construction put upon the same language in *Morgan vs. Louisiana.*

This conclusion was arrived at by referring to the Eighteenth Section of the Act of February 4th, 1872, amending the Charter of the Pensacola & Louisville Railroad. That section was cited. The last named company having become assignee of the Alabama & Florida Railroad Company, and all of its franchises and property, which corporation was exempt from taxation for a limited period, the said Pensacola & Louisville Railroad Company, and its property, now owned or hereafter to be acquired, was also exempted from taxation during the remainder of said period.

The Court in the first part of the opinion held that if the exemption from taxation had passed with the sale, it was unnecessary in the Act of February 4, 1872, to confer by legislative act, the same exemption upon the purchaser of the property. Then referring to the Act of 1877, incorporating the Pensacola Railroad Company, by which it was authorized to acquire by purchase and assignment, all

the rights, property, franchises, privileges and immunities of the Pensacola & Louisville Railroad Company, the Court held that this language was broad enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola & Louisville Railroad Company by the Eighteenth Section of its Charter. But the Court in its opinion also said, that this was a privilege personal to the Pensacola & Louisville Railroad Company and consequently did not pass to the plaintiff through the mesne conveyance from the Pensacola Railroad Company.

The Court explained its position as follows:

> "The title of the plaintiff in error, therefore, to the exemption claimed must be supported by some other authority. This is claimed to be found in the general power given by the Thirteenth Section of its Chater to the Pensacola & Louisville Railroad Company to lease or sell to or consolidate with any other Railroad Company, in or out of the State, which power passed with others to the Pensacola Railroad Company by the Second Section of its Charter. But as we have already seen and as was decided (citing *Morgan vs. Louisiana, Wilson vs. Gaines*) the exemption from taxation does not pass by virtue of a conveyance of the *railroad and its franchises*, which was all the Pensacola Railroad Company could pass under that authority, but requires for its transfer some particular and express description, indicating unequivocally the intention of the Legislature that it might pass by an assignment."

The Court then proceeds to show that under the Constitution of the State, which took effect in 1868, and which expressly provided that the property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational or charitable purposes, overrode the Charter of the Pensacola & Louisville Railroad Company in 1872, and the Charter of the Pensacola Railroad Company in 1877.

Neither of them could take an immunity forbidden by the Constitution, because they were new corporations, incorporated after the constitutional provision took effect, and so incapable of holding any immunity from taxation, and consequently neither of them was able to convey any title to immunity from taxation to the plaintiff.

Chesapeake & Ohio R. R. Co. vs. Virginia, 4 Otto 718.

The headnote of that case is,

> "Where the statute which authorizes the consolidation of two companies declares that the consolidated company shall possess all the rights and privileges which each of the companies enjoyed under its charter, those rights and privleges of each do not extend beyond that portion of the aggregated property which each had held under its charter."

It appeared that in 1866 the Legislature of Virginia passed an act authorizing the incorporation of the Covington & Ohio River Railroad. The State having been divided a few days after, the Legislature of West Virginia passed a similar act, similarly entitled. The seventh section of the act provided, "No taxation upon the property of said company shall be imposed by the state until the profits of the company shall amount to ten per cent. a year on its capital." The ninth section provided for the appointment of five commissioners, to be appointed by each state to procure persons to furnish the necessary capital and incorporate under the act. The corporation was never formed.

In 1867 the legislatures of both states, passed an act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio River. The acts provided that if the Covington & Ohio Railroad Company should be organized, it might consolidate with three other companies named, into one corporation known as the Chesapeake & Ohio Railroad corporation. The second section gave to the consolidated company, in case the consolidation should be effected, all the rights, privileges, franchises and property which might have vested in either company prior to the act of consolidation. The act further provided that one of the railroad companies named in the act, Virginia Central, might contract with the Chesapeake & Ohio R. R. Commissioners for the construction of a railroad from Covington to the Ohio River, and in case such contract should be made the said Virginia Railroad Company should be known as the Chesapeake & Ohio Railroad Company "and shall be entitled to all the benefits of the charter of the Covington & Ohio Railroad and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake & Ohio Railroad Company when organized."

The consolidation first proposed never took place. The second was accepted. The Virginia Central did enter into the contract au-

thorized by the act and became the Chesapeake & Ohio, and undertook to construct the unfinished road.

"Thus the contract between the state and the company was formed and such were its terms. The question now is, how far did the contract exempt the property of the Virginia Central (now the Chesapeake & Ohio) Company from taxation, or rather what property did it exempt."

The court then goes on and determines that the Virginia Central was entitled to the same exemption as to its property that the Covington & Ohio Railroad Company would have had it become incorporated. That this right passed to the Cheapeake & Ohio Railroad as to the property which it acquired from the Virginia Central. But the property of the Virginia Central which was exempted from taxation was only such property as would have been exempted had the Covington & Ohio Railroad Company been incorporated and constructed the line of road contemplated by its charter. As to that line of road thereafter constructed by the Virginia Central, the exemption applied, but it did not apply to additional lines constructed by the Virginia Central, which the Covington & Ohio would not have been authorized under its charter to construct had it come into being. Up to that extent the Chesapeake & Ohio was entitled to the exemption.

Chesapeake & Ohio Ry. Co. vs. Miller, Auditor of the State of West Virginia, 114 U. S., 176.

The Chesapeake & Ohio Railway Company, which the Court should bear in mind was the successor of the Chesapeake & Ohio Railroad Company, which was the plaintiff in error in the case just previously cited, claimed exemption from taxation under the same Act of 1866, which authorized the incorporation of the Covington & Ohio Railroad Company. The first company, named Chesapeake & O. R'way Co., pursuant to a statute of the State of West Virginia, mortgaged its property and franchises, its property was sold in 1877 to purchasers, who in pursuance of the statute then in force, became the corporation under the name of the Cheapeake & Ohio Railroad Company, which was the plaintiff in error in the last case. The statute under which the proceedings were conducted, provided that if a sale be made under the deed of trust or mortgage executed by the railway, and

there be a conveyance, such sale should pass to the purchaser not only the works and property of the company but any works which the company may have after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale. "Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance."

The Second Section of the Act provided, "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company. * * * "

Mr. Justice Matthews, delivering the opinion of the Court, said

> "that the Chesapeake & Ohio Railroad Company, by virtue of its organization as a corporation under the Act of March 1st, 1866, became entitled to the exemption from taxation secured by the Seventh Section of that Act, and that as a matter of contract, is not denied or disputed. Whether the Chesapeake & Ohio Railway Company succeeded to that right and immunity is the question to be determined."

Justice Matthews then pursues the same line of reasoning as in the *Palms* case, *109 U. S., 244,* and upon the authority of *Morgan vs. Louisiana,* states that the language used in Section 2 of the Act providing for the conveyance under foreclosure, of the properties of the corporation, is not sufficiently broad to include an immunity from taxation.

But in the second part of the opinion it was stated that conceding the words were broad enough to pass the exemption from taxation to the plaintiff in error, the plaintiff in error was a new corporation, taking its life under existing laws by virtue of the identical act which provided that it might become a corporation and which dissolved absolutely the existing corporation. That being so, it is stated by the learned Court, "All grants of corporate powers, rights, privileges, franchises and immunities are taken subject to existing laws, remaining unrepealed."

The Court then proceeds to show that at the time the plaintiff became a corporation, the Code of West Virginia of 1869 was in force, which provided as follows: "And the right is hereby reserved to the

Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company."

The Constitution of the State of West Virginia of 1863 was in force. Section 5 of Article 11, of which provided,

> "The Legislature shall pass general laws whereby any number of persons associated for * * * may become a corporation * * * and no special act incorporating or granting peculiar privileges to any joint stock company or association * * * shall be passed. * * * No charter of incorporation shall be granted under such general laws, unless the right be reserved to alter or amend such charter at the pleasure of the Legislature, to be declared by general laws."

The Court then states that the incorporation of the plaintiff in error comes within the provisions both of the Constitution and the Code.

> "Its charter is the Law of 1871, as amended by that of 1877. Its certificate of incorporation is the conveyance to it, by the name it has chosen, as a purchaser at the judicial sale, or set forth in some writing signed by such purchaser and recorded as required. It is a charter granted under a general law, which the Constitution declares to be subject to legislative alteration and amendment."

How many members of the Court concurred in the construction placed by Justice Matthews on the language of the act, authorizing the sale, we do not know. It is clear, however, that the second ground of the opinion, within all the decided cases, was conclusive against the plaintiff in error.

Wilson vs. Gaines, 103 U. S. 417.

In this case the head note perhaps sufficiently states the gist of the case.

> "A judicial sale of the property of a railroad company under a lien does not necessarily carry with it to the purchaser any immunity from taxation which the property enjoyed in the hands of the original company. Mere general words of description are not sufficient to extend a sale beyond the subject matter of the

> lien, as defined by the statute, which lies at the foundation of the entire proceedings."

It appeared that the Nashville & Chattanooga Company was incorporated under a special act passed December, 1845, in Tennessee. The thirty-eighth section of the charter provided,

> "That capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including work-shops, ware houses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

In 1852 another corporation was incorporated, the Edgefield & Kentucky R. R. Co. Section 6 of the charter of which gave it all the powers, rights and privileges and subjected it to all the liabilities and restrictions conferred and imposed on the Nashville & Chattanooga Railroad Company. By an act passed in the same year, the governor of the state was authorized to issue to certain railroad companies, bonds of the state for the purpose of aiding the completion, and it was provided that upon such issue and the completion of the road, the State should

> "be invested with a lien, without a deed, from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and the whole superstructure and equipments, and all the property owned by the company, as incident to or necessary for its business, and all depots, depot-stations for the payment of all said bonds issued to said company, as provided in this act."

The Edgefield & Kentucky Railroad Company availed itself of this act and subjected its property to statutory lien. In 1870 the Legislature passed an act, providing that a bill of foreclosure might be filed in the Court of Chancery on behalf of the state, providing for the foreclosure of the bonds and the sale of the property. Section 10 of that act provided

> "that upon the sale of any of the franchises of either of the railroad companies * * * under the provision of this act, all the rights, privileges and immunities appertaining to the franchise so sold under its act of incorporation, and the amendments thereto, and the general improvement law of the state, and acts

amendatory thereof, shall be transferred to and vest in such purchaser."

Under the bill filed, the property was sold to the St. Louis & Southwestern Railroad Company. Its receiver filed a bill to enjoin the collection of taxes levied upon that part of its road formerly owned by the Edgefield & Kentucky Road. The court in its opinion refers to Morgan vs. Louisiana and reiterates the doctrine that immunity from taxation is a personal privilege and not transferable, "*except with the consent or under the authority of the Legislature which granted the exemption, or some succeeding Legislature.*" Then the court uses the following language,

> "In the present case the lien of the state was put by the statute only on the property of the company. It did not even, in express terms, include the franchises which were necessary to the operation of the road. Under such circumstances, if there were nothing more it would seem to be clear beyond all question that a sale under the lien would not necessarily carry with it any immunity from taxation which the property enjoyed in the hands of the original company."

It appeared and was contended, that the bill alleged that the road, its franchises, property, rights, privileges and immunity were sold and that that allegation was admitted by the demurrer. The court said in regard to this,

> "This averment must be taken in connection with the further equally distinct statement in the bill that the sale took place under proceedings instituted in the Chancery Court of Nashville 'to foreclose the state's statutory lien' and as that lien was confined to the 'property owned by the company, or incident to, or necessary for, its business,' we will not, in the absence of a particular and positive allegation to the contrary, presume that more was sold than the lien covered."

The court then distinguishes the case from another case decided by the Supreme Court of Tennessee under the same statute, which held "that not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws, and the decree in the cause, passed to and vested in, the new company." The court then proceeds to say that nowhere in the case is it

stated that anything further was sold than what was covered by the lien under the act of 1852 and, therefore, the court in conclusion says, "It would be against all the settled rules of construction to hold, upon the face of the statute alone, that more was sold than the lien to be adjudicated upon implied."

These are all of the cases where the court has passed upon the question as to whether an immunity from taxation passed under a foreclosure sale. At least they are all those cited in the prevailing opinion and one or two besides.

Counsel for plaintiff in error now desire to take up that line of cases cited in the prevailing opinion and a number of others, where there was a consolidation of two existing corporations into a new one, and the reasons given by the court why an exemption from taxation did not pass to the new company or did pass.

Shields vs. Ohio, 95 U. S. 319.

This is the leading case laying down the doctrine that where two corporations are consolidated, one of them holding certain privileges and immunities in the way of exemption from taxation, and the corporations are both dissolved and a new corporation springs into existence, the new corporation is subject to the existing laws, and if the existing laws forbid the enjoyment of the exemption or special privileges theretofore enjoyed by either of them, the new corporation does not take. Certain railroads, among them the Junction Railroad Company, were consolidated in April, 1869, under the name the Lake Shore & Michigan Southern Railway Company. By the Charter of the Junction Railroad Company, passed in 1846, the Eleventh Section empowered the Company to charge such tolls for the transportation of freight and passengers as it might deem reasonable. The Constitution of Ohio took effect in 1851, and declared: "No special privileges shall ever be granted that may not be altered, repealed or revoked by the General Assembly." In 1873 the Legislature of Ohio passed an act fixing the rate of fare for passengers on all railroads, as not exceeding three cents per mile. The Court held, that the consolidated railroad took all its powers subject to the constitutional provision of 1851, which permitted the Legislature to alter or amend any special privileges, and the consolidated corporations being dissolved, and the new

corporation coming into life, all of its rights and franchises became subject to the provisions of the existing Constitution.

St. L. I. M. & S. Ry. Co. vs. Berry, 113 U. S., 465, is a case where the same doctrine is laid down. The Cairo & Fulton Railroad Company by the Act incorporating it, in 1853, possessed a privilege which was, that its property should be forever exempt from taxation. The Constitution of the State, adopted in 1868, declared, that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." Under an Act of the Legislature of the State of Arkansas, passed in 1868, the Cairo & Fulton Railroad Company and other railroads became consolidated under the name of plaintiff in error. The Court held that the new corporation became subject to the provisions of the new Constitution, which prevented it from taking this special exemption. The language of the Court upon this subject is very clear, it being urged that the act of consolidation having been made in pursuance of the Charter of the Cairo & Fulton Railroad Company, it was exercising a right secured to it by contract. The Court said,

> "Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation on the part of the State that the Cairo & Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation with such powers and privileges as at the time when the offer is accepted and acted upon, may then be in the power of the State to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the Charter of the Cairo & Fulton R. R. Co., including the exemption in question, would have vested in the new company. But it was not accepted and acted upon until a change in the organic law of the State forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation, it did so in full view of the existing law."

Maine Central R. R. Co. vs. State of Maine, 96 U. S., 499.

The doctrine of this case is exactly similar to that of the last two.

Two railroad corporations, incorporated by a special act, in the Charter of each of which was a clear limitation upon the power of the State to tax, became consolidated under an Act of the Legislature, the effect of such consolidation being to wipe out the corporate existence of each of the two consolidating companies, and create a new.

The decision of the Court is stated in Subdivision 3 of the head note: "A new corporation formed by the consolidation of two others, held to be subject to the provisions of the General Law of Maine, which declares that any act of incorporation, subsequently passed should at all times thereafter, 'be liable to be amended, altered or repealed at the pleasure of the Legislature,' " and although the consolidated acts conferred upon the new company "all the *powers, privileges* and *immunities*" possessed by each of the consolidating companies; nevertheless, the new corporation, taking its powers by virtue of the statute in existence at the time it came into life, became subject to the General Law permitting the alteration or amendment of its Charter.

In this case the Court directly approves and distinguishes certain cases which will be hereinafter cited.

Railroad Company vs. Georgia, 98 U. S., 359.

The doctrine of this case is the same as that of the preceding. Where two Railroad Companies, prior to 1863, each enjoying a limited exemption from taxation, and were consolidated by an Act of the Legislature of the State of Georgia, of 1863, which conferred upon the consolidating companies full corporate powers and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. The court held that by the consolidation, the new corporation was created and the original companies dissolved; that the new corporation became subject to the provision of the existing code, which reserved the right of the Legislature to withdraw its Charter, or to change, modify or destroy it, and hence, that a subsequent act withdrawing the exemptions, did not violate the provisions of the Constitution.

We desire to call the Court's attention to the language of the Court in delivering the opinion which clearly distinguishes the case at bar;

"The consolidation provided for was clearly not a merger of

one into the other, as was the case of *R. R. Bkg. Co. vs. Georgia, 92 U. S., 665.* Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. * * * Looking thus at the legislative intent, appearing in the Consolidation Act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from an union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."

The N. & W. R. R. Co. vs. Pendleton, 156 U. S., 667.

In this case, certain corporations whose special charters empowered them to fix their own charges, became consolidated under a law of the State of Virginia, passed in 1870, under the name of the Atlanta, Mississippi & Ohio R. R. Company. The act of incorporation entitled the last named company to acquire all the property and franchises of the several railroads possessing the powers mentioned. It did acquire them. The Act of 1870 authorizing the formation of the A. M. & O. R. R. provided that it should be vested with all the rights and franchises of the several railroad companies, but another section of the Act provided that the company itself should be subject to all the laws of the commonwealth, among which was an Act passed in 1853, which permitted the State of Virginia to regulate the tolls upon railroads.

A mortgage upon the property of the A. M. & O. R. R. Company was foreclosed and the property and franchises sold to the plaintiff in error, which was a railroad corporation. The court held that the A. M. & O. R. R. Company, created in 1870, was created subject to the provisions of the Act of 1853, which, by its own charter, applied to it, and that law being in existence, was hostile to any right which might have been held by either of the companies whose property and rights it acquired. Justice Shiras, delivering the opinion said:

"If the original companies did have a contract with the State

whereby, until a certain amount of the money should be earned, they should have the right to fix and regulate their charges, it is clear that the A. M. & O. R. R. Company accepted their charter with a distinct provision that the company should be subject to the general laws of the commonwealth, one of which was the very law, then and still in force, which prescribed the tariff of rates endorsed in present suits.

It is equally obvious the the Norfolk & Western R. R. Co., the plaintiff in error, by becoming the legal successor to the A. M. & O. R. R. Co. was brought within the scope of those general laws and cannot successfully claim immunity under the charters of the previous companies."

In the following part of the opinion, the court enunciates and clearly defines the extent of the doctrine laid down in the Morgan case, the Wilson case and Cheapeake & Ohio case:

"We have frequently held that in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation made in the exercise of a power given by the statute, confers no rights upon purchasers at a foreclosure sale to exist *as the same corporation*, but to reorganize a new corporation, subject to the laws *existing at the time of the reorganization.*"

The whole doctrine of this case and of the cases preceding it, is based upon the theory, not that the exemption will not pass to a new company, if proper words of transfer are used in a statute permitting the transfer of the property, franchises and rights of a corporation; but that a new corporation, taking the property, rights and franchises and deriving its life under existing laws, must take those rights and franchises limited by the laws in force at the time the new corporation comes into life, and if those laws are hostile to the particular privilege or immunity, the new company is powerless to take it, or takes it subject to the right of alteration, amendment or repeal.

Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S., 301.

In this case it appeared that the Alexandria & Bloomfield R. R. Co. was chartered by special act of February 9th, 1857, under the Laws of Missouri. Its special charter contained the following exemption: "Stock of said company shall be exempt from taxation for a period of twenty years after its completion." On March 2nd, 1869, the Legislature passed an act authorizing any railroad corporation to consolidate with the railroad of another state, and provided that the consolidated company should "be entitled to the same franchises and privileges, under the Laws of this State, as if the consolidation had not taken place." It appeared that pursuant to this Act, the company consolidated with an Iowa corporation under the name of M. I. & N. Ry. Co.

Subsequently its property and franchises were sold under a mortgage to the plaintiff in error and the State levied taxes upon the property of the consolidated company. The plaintiff in error claimed the exemption given by the original act of incorporation with the A. B. R. Ry. Co. The court held that by the consolidation of 1870, the two companies were dissolved and a new company was organized under the Laws of the State of Missouri, subject to the constitution of 1865, which contained the following provision: "No property, real or personal, shall be exempt from taxation, except such, etc." the exceptions not covering railroads. Enunciating the same doctrine laid down and referring to in many of the cases hereinbefore referred to.

P. F. & M. I. vs. State of Tennessee, 161 U. S., 174.

In that case the Legislature of the State of Tennessee passed an Act incorporating the Bluff City Insurance Company of Memphis, and by Section 10 it was enacted: "That said Company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

In 1858 the Legislature incorporated the De Soto Insurance Company, and its charter was amended in March, 1860, and by Section 11 of the Act "all the *rights, privileges and immunities*" of the Bluff City Insurance Company were granted to the DeSoto Insurance Company.

In March, 1867, the Washington Fire & Marine Insurance Company was incorporated by the Legislature, and by the Act of incor-

poration "all the *rights and privileges*" (omitting the word "immunities") of the DeSoto Insurance Company of Memphis were granted to the Washington Fire & Marine Company.

In 1881 the name of the W. F. & M. Ins. Co. was changed to the Phœnix Fire & Marine Insurance Company of Memphis.

The question was, whether the plaintiff in error succeeded to the exemption from taxation originally granted to the Bluff City Insurance Company.

Mr. Justice Peckham, in delivering the opinion of the Court, examined at great length most of the cases bearing upon this question, and a majority of this Court came to the conclusion that whether or not the words "rights and privileges" were broad enough, originally, to pass an exemption from taxation, that the significant omission of the word "immunities" which was contained in the grant to the DeSoto Company, was significant of the intention of the Legislature not to permit the words "privileges" to be extended sufficiently to include the word "immunities." And therefore in the particular case, this Court held that the immunity from taxation did not pass under the word "privileges."

The conclusion of the prevailing opinion was, that the Court must determine, from all the circumstances, in each case, whether there was the intention that it should pass.

Picard vs. E. T. V. & G. T. T. Co., 130 U. S., 637.

This is a case that was practically determined upon the authority of *Morgan vs. Louisiana*, cited supra, although the Court examined to some extent, the question as to whether an exemption from taxation would pass under the word "privileges." Yet the defendant in error claiming an exemption from taxation, took its title under a statutory foreclosure of a mortgage, and the decree provided only for the sale of the "*property and franchises* of the Railroad Company executing the mortgage, and originally vested with the immunity from taxation."

The W. & W. R. R. Co. vs. Alsbrook, 146 U. S., 279.

In that case the plaintiff in error claimed immunity from taxation upon its branch roads, under a statute of the State of North Carolina, which incorporated the original company, and exempted from

taxation the property of the Company in the following language: "Property of said Company and the shares therein shall be exempt from any public charge or tax whatever."

By Section 21 of the Act, branch roads were authorized, and by Section 22 it was provided

> "that all the powers, rights and privileges conferred by the preceding section upon the said Company, in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said Company, and the President and Directors thereof, in the *laying out,* in the *construction,* and in the *use and preservation* of such lateral or branch road."

This Court held that a fair construction of this language, limited as it was, was, that the words "powers, rights and privileges" related only to the laying out, the construction, the repair and the operation of the branches, and not to the exemption from taxation.

We now desire to call the Court's attention to the cases where this Court held the doctrine that where there was a merger of two corporations, the merging corporation retaining its corporate life, that under apt words, an exemption from taxation passed.

Yazoo & N. V. R. R. Co. vs. Adams, 180 U. S., 1.

In this case, the Court at great length discussed the question as to whether the decision of the State Court that a statute did not create a contract, presented a federal question, and held, very distinctly, that the Supreme Court was to determine for itself as to the existence of the contract.

The facts of the case are exceedingly complicated, but it appears that several Railroad Companies, enjoying, under their respective Charters, exemptions from taxation, became consolidated into one Company, in 1892, and the new Company claimed to hold the exemptions from taxation by virtue of the consolidation under which it acquired all of the rights, privileges and franchises of the companies. The Court held, following the long line of cases, that the plaintiff in error became a new corporation with a new grant of corporate franchises and having become incorporated, subsequent to the adoption of the new Constitution of 1890, making such corporation subject

to the provisions which require the property of corporations to be taxed like that of individuals, and consequently, the consolidating Company, being forbidden by the Constitution of the State from enjoying exemption from taxation, could not lawfully exercise the rights held by the old Company. The Court exhaustively reviewed many cases, distinguishing the cases which counsel will now proceed to cite, and upholding their doctrine.

See Opinion at pages 19 and 20, where all of the cases which we will now cite are approved. The whole result of the decision of the Court is summed up at page 25 of the Opinion in the following paragraph: "Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this Constitution, was a new grant of corporate franchises, within the meaning of Section 180, it follows that it became subject to the provisions of Section 191."

The Court's attention is called to the fact that in all of the preceding cases, the Supreme Court recognizes the fact that exemptions from taxation will pass to another Company if the language of the statute authorizing the transfer is broad enough to include them, and there is no existing statute or constitutional provision in existence when the new purchasing Company comes into life, which forbids it from exercising the particular privilege, or which reserves the right to alter, amend or repeal it.

Southwestern R. R. Co. vs. State of Georgia, 92 U. S., 762.

The head note of that case is as follows:

> "Where a new corporation was not created by the union of two companies, but the powers of one Company were enlarged, and all the *rights, privileges* and *property* of the other became the rights and property of the former, the exemption from taxation, which each of the companies enjoyed under their original Charters, was not changed by such union."

It appeared that two railroad Companies, each enjoying in their Charters an exemption from taxation beyond one-half of one per cent. of its income, were united by an Act of the Legislature, the effect of which was to extinguish the Muscogee Railroad Company by its merger in the Southwestern. The Court said:

"No new corporation was created by the union of the two companies; but the powers of the Southwestern were enlarged and all the rights, privileges and property of the Muscogee Railroad Company became the rights and property of the Southwestern. The exemption from taxation, which both companies enjoyed under their original charters, cannot, therefore, be withdrawn by the Legislature."

This case holds, not only that an exemption from taxation may pass, under a merger, but that the words, *"rights, privileges and property"* are broad enough to pass it.

Tomlinson vs. Branch, 82 U. S., 460.

In this case, the power of the State Legislature to exempt certain property from taxation, was again affirmed. The Second Subdivision of the head note is as follows:

"Where a railroad by its charter was granted such an exemption for a limited period, and was afterwards merged in another railroad company, which became invested with all its property, rights and privileges, the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired, without express words or necessary intendment to that effect."

In this case the Court held very distinctly that the exemption from taxation, for a limited period, of the property of the railroad merged, passed under the words, *"property, rights and privileges."* But it was claimed by the merging corporation that its own perpetual exemption from taxation must be extended to the property of the merged corporation. But the Court held very distinctly that this was not so, that it only extended to such rights and privileges as the merged company had theretofore enjoyed. The Court in its opinion referred to the case of the *P. W. & B. R. R. Co. vs. Maryland, 10 Howard, 376,* where the same claim was made, that the merging company, having a greater exemption from taxation than those contained in the charters of the companies merged, that its own exemption extended to all of the property acquired by it under the merger.

The Court in speaking of that case refers to it as follows:

"One of these companies was exempt from certain taxation,

and it was claimed by the consolidating company that this exemption was transferred to it and affected all parts of the line. The Act authorizing the union of the several companies provided that the 'said body corporate so formed should be entitled * * * to all the powers and privileges and advantages then belonging to the former corporations,' and the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the Court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be, that whatever privileges and advantages either of the former companies possessed, should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them."

The Court, it will be observed, distinctly recognized the doctrine that the exemption from the taxation of the merged companies passed to the merging company, but only to the extent that it had been enjoyed theretofore by the merged companies. Exactly to the same effect is *Central R. R. & B. Co. vs. State of Georgia, 92 U. S. 665.*

That was a case of a merger, but the new company claimed that it, possessing under its original charter an exemption from taxation, that the exemption extended to the property acquired by it from the merged company. The Court distinctly recognized the doctrine that upon the merger of the two corporations, any rights and privileges or exemptions from taxation enjoyed by either company, passed, but that those exemptions were confined to the property held and owned by the original companies, each for itself, prior to the merger.

Tennessee vs. Whitworth, 117 U. S., 139.

That case unanimously determined by the Court is an unanswerable authority upon the position which we here take, that the exemption for making pavements passed to the Rochester Railway Company under the provisions of the merger act, and under the words, *"property, rights, privileges and franchises."*

The head note of that case is as follows:

"A grant to a railroad company of all the rights, powers and

privileges, or all powers and privileges of another company, entitles it to the same exemptions from taxation that the other company has. Second—Upon the consolidation of two or more railroad companies, under authority of law, the presumption is that the new company has all the powers and privileges of the old company."

The Court exhaustively examined the meaning of the word "privilege." The case was complicated by a provision in the constitution of the state, which provided "The Legislature shall have no power * * * * to pass any law granting to any individual or individuals, rights, privileges, *immunities or exemptions,* other than such as may be by the same law extended to any member of the community * * * *" It was shown that the Supreme Court of Tennessee had decided that the words "rights," "privileges," "immunities" and "exemptions," must be given a construction so that neither of the words could be construed to include the meaning of the other. Therefore, the word "privileges" could not include the word "immunities," or "exemptions," and that the statute granting *rights, privileges* and *franchises,* must be construed as the constitution had been construed. The Court in answer to this contention said:

"We see nothing in the constitution which gives to the word 'right,' or 'privileges,' or 'immunity,' or 'exemption,' any different meaning than that which it has among the people at large. There may be and probably are some 'immunities' and some 'exemptions' which would not be considered as either 'rights' or 'privileges' in the popular acceptation of those terms. It was to reach such immunities and such exemptions, as seems to us, that this particular form of expresssion was used in the constitution; and not to provide that under no circumstances should the word 'privilege' in a statute of Tennessee be held to include a privilege of exemption from taxation. Words in a constitution as well as words in a statute, are always given the meaning they have in common use, unless there are very strong reasons to the contrary. We find no such reasons in this case, and as an exemption from taxation is a privilege in the popular sense of that term, we feel ourselves compelled to decide that both the Tennessee and Alabama Company and the Central Southern Company were granted such an exemption by their charters, notwithstanding the contrary opinion of the Supreme Court of Tennessee, which, although entitled to great respect, is not binding upon us as an authority under the circumstances of this case."

It was further held that these rights passed to the Nashville & Decatur Company under a consolidation of the two companies into it, and it will be observed that at the time the Nashville & Decatur Company came into existence there was no constitutional provision and no statute, as in many of the other cases, which prevented it from taking these exemptions from taxation. Had there been, the case would have fallen directly within the line of authority laid down in the case of *Shields vs. Ohio, 95 U. S. 219*, and the other cases cited.

Humphrey vs. Pegues, 83 U. S., 244.

The head note in that case states the decision:

> "Where a state granted a Charter to a Railroad Corporation and subsequently passed an Act amending its Charter by exempting its property from taxation, a subsequent Railroad Corporation created by such State, with all the powers and privileges of the former corporation, possessed the same immunity from taxation."

The Court, speaking through Mr. Justice Hunt, disposed of the whole contention in the following language:

> "All the 'privileges,' as well as powers and rights of the prior Company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, as a special exemption from a burden falling upon others."

It will be observed that in all of the cases cited and examined there was a general exemption from all taxation, either for a limited time or perpetually, contained in all charters examined and which were claimed to constitute contracts, and in all of them necessarily a very rigid rule of construction was applied, that a general exemption from all taxation will never be implied but must be conferred by clear and unmistakable language. The exemption was contained in a charter and not in a franchise, as in the case at bar, thereby leaving the State free to act in some fo the cases under its reserved power.

Again, it will be observed that the special charters examined in all of these cases contained no words of assignability, nor was the

exemption granted to the particular corporation, "its successors and assigns."

But the grant in every case was directly to the particular company.

And it will further be observed that in all of these cases the Court held invariably that, although the Legislature in conferring the exemption intended it as a privilege personal to the grantee, yet it was held that it was competent for the same or a subsequent Legislature to permit a transfer of the exemption by a precedent or subsequent act, provided the language contained in the Act permitting the transfer, was broad enough to cover the particular exemption granted to the first grantee.

Therefore, by the language used in all of the cases, wherein an exemption from taxation is spoken of as a personal privilege which cannot be assigned, it is clearly meant that it cannot be assigned by virtue of any power of assignment contained in the act itself, which grants the exemption from taxation, but that it is entirely competent for the Legislature to permit an assignment of the personal privilege spoken of by another act. And so, running through all the cases cited, the Court will see how carefully the language permitting the mortgage of property, franchises and privileges is scanned, how carefully the language of statutes bestowing upon another company the same rights and privileges held by the grantee company is examined, and how carefully the language of the several acts permitting the consolidation of the grantee company with another company not enjoying a special exemption is examined, and in every case, in the absence of a statute or constitutional provision, expressly forbidding the transfer to a new company, the Courts have held that these exemptions are transferable, while in the same breath the Court speaks of them as "personal privileges."

Therefore, we say that in the light of all these cases giving to them all their full force and effect and construing the grant to the Rochester City & Brighton Railroad Company of an exemption from paying for new pavements, as a privilege personal to that Company, then we say that, the same Legislature, the same power that conferred the privilege expressly provided in the Merger Acts of 1867 and 1879, that that particular privilege should pass to any merging company which might thereafter comply with the provisions of the Merger Acts.

And we urge that the Rochester Railway Company was such a merging corporation and that when it acquired the entire capital stock of the R. C. & B. R. R. Co., then held under lease, and filed the certificate required by the Merger Acts, it acquired all the estate, property, rights, *privileges* and franchises of the R. C. & B. R. R. Co., and now holds them as "fully and entirely and without change or diminution, as the same were before held and enjoyed," and that directly within the meaning and the authority of the several cases examined and digested under this head.

But Section 5 of Chapter 34 of the Act of 1869, was not a general exemption from taxation, if it was an exemption at all. As before argued, the franchise of the Rochester City & Brighton Railroad company, granted by the ordinances of the City of Rochester and the statute itself, was, under the unbroken line of decisions of the New York Courts, a piece of property, taxable and alienable as a whole. That piece of property was made up of the right to construct, maintain and operate a street railroad in the City of Rochester. Its value was made up from its earning capacity, the length of its life, the burdens imposed upon it, and the privileges and immunities possessed by it.

The Railroad Company could not dispense with the burdens, nor can the State, or the City of Rochester, destroy the benefits and leave the corporation to bear the burdens. The franchise was a piece of property, as a whole. That piece of property passed to the plaintiff in error under the lease and the proceedings taken under the merger acts, as a whole. It is impossible to say, truthfully, that the right to operate that railroad in the streets of Rochester passed, relieved from the burdens, in any degree, or without the corresponding benefits which off-set the burdens and gave the franchise value.

Herein lies the clear distinction between this case and every case cited and examined in this part of the brief, on behalf of the plaintiff in error. All those cases were, as before said, cases where the State had parted with its power of general taxation, and came directly within the rule that a state will never be presumed to have parted with its general power of taxation, except the language used is capable of no other construction, and it will never permit the privilege, if granted, to be regarded other than personal, except where the language used is capable of no other construction. But that rule applies, and

applies alone, to a release of the general power of taxation. It can have no application to a contract so plain, so well-defined, so just and equitable, as was this contract, when it was made in 1869.

Under the existing laws of the State of New York, the question to be determined here, involves the amount of the judgment recovered, and interest. It involves, possibly, from seventy-five thousand to one hundred thousand dollars, claimed by the City for pavements made since the making of the contract in 1901. So far as future pavements are concerned, the question is more academic than real. The Franchise Tax Law of the State of New York, held to be constitutional by the highest court of that State, held to be constitutional by this Court, permits the State and the City of Rochester, in the assessment of the value of this franchise, to make the tax cover, in the future, the value of every foot of pavement laid between its tracks, the rails of its tracks and two feet outside. The tax commissioners, in arriving at the value of a franchise, have the right to take into consideration its earning capacity, its burdens and its benefits, and to say what its value is, and the tax shall be assessed upon the basis of that value.

The passage of that law, and the construction given to it by this Court, is the strongest argument that can be made upon behalf of the plaintiff in error, that its construction of the Act of 1869, and of the merger acts, is right, eternally right. That this franchise, as a whole, is property, and the State cannot add to it or take from it, constitutionally, without the consent of the plaintiff in error.

Why should not the great sovereign State of New York be held to its contracts, deliberately made? Why should it seek, through the power of its sovereignty, to take from this corporation the thing which it has bought and paid for, to the extent of four millions of dollars? Why should it seek to strike down and emasculate the value of the thing which it has granted, by taking from it the very benefits that form the sole consideration for the burdens?

IV.

THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, ENTERED BY DIRECTION OF THE COURT OF APPEALS SHOULD BE REVERSED, AND

SUPREME COURT OF THE UNITED STATES.

ROCHESTER RAILWAY COMPANY.
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

On page 96 of brief of plaintiff in error after figures "1869" in first paragraph insert.

But Chapter 34 of the Laws of 1869 was in no sense an exercise of the taxing power of the State, nor was it in any sense an exemption from taxation. The conditions and burdens imposed upon the Rochester City & Brighton Railroad Company and the benefits granted, constituted, together, the purchase price of the franchise, and the franchise itself then became property taxable by the State of New York, in the exercise of its powers of taxation, for any public purpose, the same as any other property. The nature of this so-called exemption was clearly pointed out in the franchise tax cases hereinbefore referred to. There it was claimed that the specific burdens in the way of annual percentages paid by the various corporations to the State or municipality, pursuant to the provisions of the several charters of such companies, or the franchises granted, was intended to be in lieu of all other taxation and deprived the State of its power to impose taxes for general or municipal purposes.

But this contention was aptly answered in the opinion of Judge Vann, delivering the judgment of the New York Court of Appeals, 174 N. Y. 448, and the following language aptly expresses the situation here:

> "The condition upon which a franchise is granted, is the purchase price of the grant, the payment of which in money, or by an agreement to bear some *burden,* brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption."

This reasoning was adopted by this Court in its disposition of these cases. In *People ex rel. M. S. R. Co. v. N. Y. S. B. of Tax Commissioners,* |*99 U. S. 1,* Mr. Justice Brewer, delivering the opinion of this Court pointed out in distinguishing the case of *Chicago v. Sheldon, 9 Wall. 50,* which was relied upon by the plaintiffs in error, the clear distinction between this case which is on-all-fours with *Chicago v. Sheldon,* and the franchise tax cases. At page 43, in speaking of that case, he said:

> "An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc. of the streets on which its railway was authorized to be constructed. The company, having accepted and complied with the terms of this ordinance, the city attempted by assessment *for special improvements* to compel the railway company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation and only held void the effort of the city, under the guise of special assessments, to increase the obligations *specifically assumed* by the railway company under the original ordinance."

And so here, the railway laws attempt to impose, under the guise of further conditions, the specific burden which the Act of 1869 took from the railroad company.

None of these Acts are in the nature, even, of taxation. The Act of 1869 imposed certain burdens which were the price paid by the company for the franchise granted. The railroad acts imposed specific burdens upon specific railroad companies, incorporated under the several acts, which are a part of the purchase price of the several franchises. The very nature of general taxation is, that the State imposes it upon the property of all citizens as equally as may be and all property in whosesoever hands it may be, is subject to this power, excepting certain property which may be specifically exempted where it is devoted to charitable, religious or public purposes. It is not claimed here, that this particular property is not subject to the exercise by the State of this power.

Again, the State exercises the power of special taxation for public improvements benefiting particular property. But this Court has uniformly held that although the State may itself determine the necessity of the improvement and the area of the property to be benefited, or may delegate that power to commissioners to determine, yet the assessment must be eventually laid against the property benefited, in proportion to the benefits received by the property, subject to the assessments, and at some stage of the proceeding the property owner is entitled to a hearing upon the question of the extent of the benefit to his property.

But the legislation in question does not conform, in any way, to the theory upon which general or special taxation is based.

Take the General Railroad Act of 1884, which, for the first time imposed upon railroads the duty of keeping the pavements in repair. Section 9 of that Act is quoted in full at page 11 of this brief. It will be seen that it imposed upon the railroads incorporated under the provisions of that Act and constructing or extending a railroad under the provisions of that Act, the duty of keeping in permanent repair a certain portion of the street or avenue in which its tracks were laid, provided those tracks were laid or constructed under the provisions of the Act itself. It did not apply to any tracks constructed prior to the passage of the Act.

And it provided that the municipal authorities might arbitrarily determine the necessity for repair and make the same at the expense of the corporation, in case of its neglect to do so.

This was not an exercise of the power of taxation, it was a condition imposed upon every railroad constructing a road or an extension of a road under the provisions of that particular Act, and a part of the purchase price of its franchise, and that franchise, when complete, was subject to the State's general power of taxation.

Then came the Act of 1890, Chapter 565 of the Laws of that year, which took effect on the first day of May, 1891.

Section 90 of Article 4 of that Act, made the provisions of the Act applicable to all street railroads organized for the purpose of building and operating or extending a street railroad. Section 98 of the Act imposed upon every such corporation the duty of keeping in repair a certain portion of the street in which its tracks were laid, whenever they might have been laid, and whenever required by

the local authorities and in such manner as the local authorities might prescribe.

It provided that in case of the neglect of a corporation to make the pavements or repairs, they should be made by the municipality at the expense of the corporation.

Here the Court will observe was an attempt upon the part of the legislature to arbitrarily impose this condition upon every street railroad, and as to all of its tracks, no matter what might be the provisions of its charter or the provisions of any franchise granted to it. It was not in the nature of taxation, because as before shown, it partook of none of the qualities or requisites of the legal exercise of the power of taxation. So far as it imposed this condition upon existing railroads, extending their tracks under its provisions and confined the burdens to such extensions, it was a legal exercise of the legislative power and the burden is properly treated as a part of the purchase price of the franchise. But so far as the Act attempts to impose this specific burden upon that part of the tracks of a railroad constructed long prior to the passage of any of the railroad acts in question, and constructed under a franchise specifically exempting it from this particular burden, the Act is an arbitrary exercise of legislative power and void under all the decisions, both of the State of New York and of this Court.

The distinction between this case and all of the cases cited, bearing upon exemptions from general taxation, is as wide as space itself.

Upon the general principles involved in this action, I cannot refrain from quoting from the opinion of Mr. Justice James Wilson, to whose great services the people of the United States have lately accorded tardy appreciation, who, at the very beginning of the government, in the case of *Chisholm v. the State of Georgia, Second of Dallas, 49,* used this language:

> "Is the foregoing description of the state a true description? * * * Is there any part of this description which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is; if justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper it surely cannot

be. The only reason, I believe, why a free man is bound to human laws is *that he binds himself.* * * * A state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a sovereign state?"*

THE JUDGMENT OF THE SUPREME COURT, OF APRIL 18TH, 1904, AND OF THE APPELLATE DIVISION OF THE SUPREME COURT, OF DECEMBER 6TH, 1904, SHOULD BE AFFIRMED WITH COSTS TO THE PLAINTIFF IN ERROR IN THE COURT OF APPEALS AND IN THIS COURT.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error,
9th Floor German Insurance Building,
Rochester, New York.

WILLIAM C. TRULL,
New York,
JOSEPH S. CLARK,
Philadelphia,
Of Counsel.